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# UNITED STATES

# CIRCUIT COURTS OF APPEALS

# REPORTS

WITH ANNOTATIONS

0 148-149 Fed

VOLUME 79

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# ACT ESTABLISHING

THE

# CIRCUIT COURTS OF APPEALS

AND

# AMENDMENTS THERETO.

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**ACT MARCH 3, 1891, c. 517.**

An Act to Establish Circuit Courts of Appeals and to Define and Regulate in certain cases the Jurisdiction of the Courts of the United States, and for other Purposes. (26 Stat. 826.)

*Be it enacted by the senate and house of representatives of the United States of America, in congress assembled,* that there shall be appointed by the president of the United States, by and with the advice and consent of the senate, in each circuit, an additional circuit judge, who shall have the same qualifications, and shall have the same power and jurisdiction therein, that the circuit judges of the United States, within their respective circuits, now have under existing laws, and who shall be entitled to the same compensation as the circuit judges of the United States in their respective circuits now have.

**Circuit courts of appeals established; powers, proceedings, officers, costs and fees, and rules.**

Sec. 2. That there is hereby created in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, and which shall be a court of record with appellate jurisdiction, as is hereafter limited and established. Such court shall prescribe the form and style of its seal and the form of writs and other process and procedure as may be conformable to the exercise of its jurisdiction as shall be conferred by law. It shall have the appointment of the marshal of the court with the same duties and powers under the regulations of the court as are now provided for the marshal of the Supreme Court of the United States, so far as the same may be applicable. The court shall also appoint a clerk, who shall perform and exercise the same duties and powers in regard to all matters within its jurisdiction as are now exercised and performed by the clerk of the Supreme Court of the United States, so far as the same may be applicable. The salary of the marshal of the court shall be twenty-five hundred dollars a year, and the salary of the clerk of the court shall be three thousand dollars a year, to be



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paid in equal proportions quarterly. The costs and fees in each circuit court of appeals shall be fixed and established by said court in a table of fees, to be adopted within three months after the passage of this act: Provided, that the costs and fees so fixed by any court of appeals shall not, with respect to any item, exceed the costs and fees now charged in the Supreme Court; and the same shall be expended, accounted for, and paid for, and paid over to the Treasury Department of the United States in the same manner as is provided in respect of the costs and fees in the Supreme Court.

The court shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law.

Act March 3, 1891, c. 517, § 2, 26 Stat. 826. Act July 16, 1892, c. 196, § 1, 27 Stat. 222. Act Feb. 19, 1897, c. 263, 29 Stat. 536.

So much of this section as authorizes the appointment of a marshal is repealed by Act July 16, 1892, c. 196, § 1, set forth below. And in the eighth circuit, the appointment of a messenger of the court, who shall also perform the duties of librarian and crier, is authorized by Act May 28, 1896, c. 252, § 1, also set forth below.

The first sentence of the clause of this section relating to costs and fees, which, as originally enacted, read, "The costs and fees in the Supreme Court now provided for by law shall be costs and fees in the circuit courts of appeals," is amended to read as set forth here, and a revision by the Supreme Court of the table of fees fixed by each circuit court of appeals is provided for, by Act Feb. 19, 1897, c. 263, set forth below.

Provisions for returns by the clerks of the circuit courts of appeals of their fees, and for the settlement of their accounts, are contained in Act June 6, 1900, c. 791, § 1, following Rev. St. § 846, found in U. S. Comp. St. 1901, p. 651.

**Courts, by whom to be held; terms.**

Sec. 3. That the Chief-Justice and the associate justices of the Supreme Court assigned to each circuit, and the circuit judges within each circuit, and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits in the manner hereinafter provided. In case the Chief-Justice or an associate justice of the Supreme Court should attend at any session of the circuit court of appeals he shall preside, and the circuit judges in attendance upon the court in the absence of the Chief-Justice or associate justice of the Supreme Court shall preside in the order of the seniority of their respective commissions.

In case the full court at any time shall not be made up by the attendance of the Chief-Justice or an associate justice of the Supreme Court and circuit judges, one or more district judges within the circuit shall be competent to sit in the court according to such order or provision among the district judges as either by general or particular assignment shall be designated by the court: Provided, That no justice or judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals.

A term shall be held annually by the circuit court of appeals in the several judicial circuits at the following places: In the first circuit,

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in the city of Boston; in the second circuit, in the city of New York; in the third circuit, in the city of Philadelphia; in the fourth circuit, in the city of Richmond; in the fifth circuit, in the city of New Orleans; in the sixth circuit, in the city of Cincinnati; in the seventh circuit, in the city of Chicago; in the eighth circuit, in the city of Saint Louis; in the ninth circuit, in the city of San Francisco; and in such other places in each of the above circuits as said court may from time to time designate.

The first terms of said courts shall be held on the second Monday in January eighteen hundred and ninety-one, and thereafter at such times as may be fixed by said courts.

**Act March 3, 1891, c. 517, § 3, 26 Stat. 827.**

**The time fixed by this section for the first terms of the circuit courts of appeals was changed by Res. March 3, 1891, No. 17, set forth below.**

**Terms in the ninth circuit, additional to the terms at San Francisco provided for by this act, to be held at two other places in the circuit, are provided for by Act May 28, 1896, c. 252, § 1, set forth below.**

**Besides the terms appointed by section 3 of this act, additional terms of the circuit courts of appeals for the fifth circuit and for the eighth circuit are appointed or authorized by amendments of this act by various statutes, set forth below.**

**Appeals, etc., from district courts to circuit courts; circuit courts to have no appellate jurisdiction.**

Sec. 4. That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts, but all appeals by writ of error otherwise, from said district courts shall only be subject to review in the Supreme Court of the United States or in the circuit court of appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the Supreme Court of the United States or in the circuit courts of appeals hereby established according to the provisions of this act regulating the same.

**Act March 3, 1891, c. 517, § 4, 26 Stat. 827.**

**Appeals or writs of error from district courts or circuit courts to Supreme Court.**

Sec. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:

In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

From the final sentences and decrees in prize causes.

In cases of conviction of a capital crime.

In any case that involves the construction or application of the Constitution of the United States.

In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

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In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for review of such cases.

Act March 3, 1891, c. 517, § 5, 26 Stat. 827. Act Jan. 20, 1897, c. 68, 29 Stat. 492.

The provision of this section for appeals and writs of error to the Supreme Court in criminal cases, which, as originally enacted, read, "In cases of conviction of a capital or otherwise infamous crime," is amended, by striking out the words "or otherwise infamous," to read as set forth here, and appeals and writs of error to the circuit courts of appeals in cases of conviction of an infamous crime not capital are authorized by Act Jan. 20, 1897, c. 68, set forth below.

Special provisions for appeals to the circuit courts of appeals from awards on arbitrations between carriers and their employés, under Act June 1, 1898, c. 370, are contained in section 4 of that act. See U. S. Comp. St. 1901, Title LVI C, "National Trade Unions, and Controversies between Carriers and their Employés."

Appellate jurisdiction in bankruptcy proceedings, and jurisdiction to superintend and revise the proceedings of the inferior courts of bankruptcy, are given to the circuit courts of appeals by the Bankruptcy Act of 1898, Act July 1, 1898, c. 541, §§ 24, 25. See U. S. Comp. St. 1901, Title LXI, "Bankruptcy."

**Appellate jurisdiction of circuit courts of appeals; questions certified to Supreme Court; certiorari from Supreme Court; appeals or writs of error to Supreme Court.**

Sec. 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

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In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed.

Act March 3, 1891, c. 517, § 6, 26 Stat. 828.

Besides the cases appellate jurisdiction of which is given by Act March 3, 1891, c. 517, § 6, set forth in Comp. St. 1901, p. 549, such jurisdiction of all suits at law or in equity respecting trade-marks registered in accordance with the provisions of Act Feb. 20, 1905, c. 592, set forth in U. S. Comp. St. 1901, under Title LX, "Patents, Trade-Marks, and Copyrights," c. 2, arising under that act, is conferred on the circuit courts of appeals, without regard to the amount in controversy, by section 17 of said act.

Writs of certiorari may be granted by the Supreme Court, for review, in the same manner as provided for patent cases by this act, of cases arising under Act Feb. 20, 1905, c. 592, set forth in U. S. Comp. St. 1901, under Title LX, "Patents, Trade-Marks, and Copyrights," c. 2, which relates to registration and protection of trade-marks.

**Appeals to circuit courts of appeals from interlocutory orders or decrees granting or continuing injunction or appointing receiver.**

Sec. 7. That where, upon a hearing in equity in a district court or in a circuit court, or by a judge thereof in vacation, an injunction shall be granted or continued or a receiver appointed, by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this Act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction or appointing such receiver to the circuit court of appeals: Provided, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed, unless otherwise ordered by that court, or by the appellate court or a judge thereof, during the pendency of such appeal: Provided further, That the court below may in its discretion require as a condition of the appeal an additional bond.

Act March 3, 1891, c. 517, § 7, 26 Stat. 828. Act Feb. 18, 1895, c. 96, 28 Stat. 666. Act June 6, 1900, c. 803, 31 Stat. 660.

This section, as originally enacted, authorized appeals to the circuit courts of appeals from interlocutory orders or decrees granting or continuing an injunction, as follows:

"That where, upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals: Provided, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal."

This section was amended by Act Feb. 18, 1895, c. 96, cited above, so as to authorize appeals also from interlocutory orders or decrees

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refusing, dissolving, or refusing to dissolve an injunction, with a further proviso authorizing the requirement, as a condition of the appeal, of an additional injunction bond, as follows:

"That where, upon a hearing in equity in a district court or a circuit court, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree or an application to dissolve an injunction shall be refused in a case in which an appeal from a final decree may be taken under the provisions of this Act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve an injunction to the circuit court of appeals: Provided, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal: And provided further, That the court below may in its discretion require as a condition of the appeal, an additional injunction bond."

But this amendment is superseded by the subsequent amendment of this section to read as it is set forth here, by Act June 6, 1900, c. 803, cited above, which omits the provisions of the previous amendment for appeals from interlocutory orders or decrees refusing, dissolving, or refusing to dissolve an injunction, while it adds provisions for appeals from such orders or decrees appointing a receiver, and also adds to the first proviso a clause authorizing a stay of proceedings in the court below by order of the appellate court or a judge thereof.

**Expenses of judge attending circuit court of appeals.**

Sec. 8. That any justice or judge, who, in pursuance of the provisions of this act, shall attend the circuit court of appeals held at any place other than where he resides shall, upon his written certificate, be paid by the marshal of the district in which the court shall be held his reasonable expenses for travel and attendance, not to exceed ten dollars per day, and such payments shall be allowed the marshal in the settlement of his accounts with the United States.

Act March 3, 1891, c. 517, § 8, 26 Stat. 828.

Annual appropriations for the expenses of justices or judges who attend the circuit court of appeals held at any place other than where they reside are made by the sundry civil appropriation acts. In the appropriation for the fiscal year ending June 30, 1906, after the words "reasonable expenses" used in previous acts, the words "actually incurred" are added, making the provision read as follows: "reasonable expenses actually incurred for travel and attendance of justices or judges who shall attend the circuit court of appeals held at any other place than where they reside, not to exceed ten dollars per day, the same to be paid upon written certificates of said judge, and such payments shall be allowed the marshal in the settlement of his account with the United States." Act March 3, 1905, c. 1483, § 1, 33 Stat. 1208.

Provisions similar to those of this section, for payment of the expenses of district judges holding court outside their districts, are referred to under Rev. St. §§ 554, 596, 597, 613.

**Court rooms; compensation of officers.**

Sec. 9. That the marshals of the several districts in which said circuit court of appeals may be held shall, under the direction of the Attorney-General of the United States, and with his approval, provide such rooms in the public buildings of the United States as may

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be necessary, and pay all incidental expenses of said court, including criers, bailiffs, and messengers: Provided, however, That in case proper rooms can not be provided in such buildings, then the said marshals, with the approval of the Attorney-General of the United States, may, from time to time, lease such rooms as may be necessary for such courts. That the marshals, criers, clerks, bailiffs, and messengers shall be allowed the same compensation for their respective services as are allowed for similar services in the existing circuit courts.

Act March 3, 1891, c. 517, § 9, 26 Stat. 829.

**Remand of cases on determination on appeal, etc., by Supreme Court or by circuit court of appeals.**

Sec. 10. That whenever on appeal or writ of error or otherwise a case coming directly from the district court or existing circuit court shall be reviewed and determined in the Supreme Court the cause shall be remanded to the proper district or circuit court for further proceedings to be taken in pursuance of such determination. And whenever on appeal or writ of error or otherwise a case coming from a circuit court of appeals shall be reviewed and determined in the Supreme Court the cause shall be remanded by the Supreme Court to the proper district or circuit court for further proceedings in pursuance of such determination. Whenever on appeal or writ of error or otherwise a case coming from a district or circuit court shall be reviewed and determined in the circuit court of appeals in a case in which the decision in the circuit court of appeals is final such cause shall be remanded to the said district or circuit court for further proceedings to be there taken in pursuance of such determination.

Act March 3, 1891, c. 517, § 10, 26 Stat. 829.

**Time and proceedings for appeal or writ of error for review in circuit court of appeals.**

Sec. 11. That no appeal or writ of error by which any order, judgment, or decree may be reviewed in the circuit court of appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed: Provided, however, That in all cases in which a lesser time is now by law limited for appeals or writs of error such limits of time shall apply to appeals or writs of error in such cases taken to or sued out from the circuit courts of appeals. And all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, and any judge of the circuit courts of appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively.

Act March 3, 1891, c. 517, § 11, 26 Stat. 829.

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**Powers of circuit courts of appeals to issue writs.**

Sec. 12. That the circuit court of appeals shall have the powers specified in section seven hundred and sixteen of the Revised Statutes of the United States.

Act March 3, 1891, c. 517, § 12, 26 Stat. 829.

The powers specified in Rev. St. § 716, referred to in this section, are the powers given to the courts to issue writs of scire facias, and all writs not specifically provided for, necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of the law.

**Appeals and writs of error from decisions of United States court in Indian Territory.**

Sec. 13. Appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian Territory to the Supreme Court of the United States, or to the circuit court of appeals in the eighth circuit, in the same manner and under the same regulations as from the circuit or district courts of the United States, under this act.

Act March 3, 1891, c. 517, § 13, 26 Stat. 829.

The provisions of this section, relating to appeals and writs of error from the decisions of the United States court in the Indian Territory, may be regarded as wholly superseded, or, at least, greatly modified in their operation, by the provisions of Act March 1, 1895, c. 145, 28 Stat. 693. Section 11 of that act establishes a court of appeals in the territory, with appellate jurisdiction over the courts therein, and provides for writs of error and appeals from final decrees of said appellate court to the circuit court of appeals for the eighth circuit, without mention of appeals or writs of error to the Supreme Court of the United States, authorized by section 13 of this act. A later provision, extending the jurisdiction of the circuit court of appeals for the eighth circuit to cases pending therein upon writ of error or appeal from the United States court in the Indian Territory, where jurisdiction would have vested in the circuit court of appeals but for Act March 1, 1895, mentioned above, is contained in Act Feb. 8, 1896, c. 14, set forth below. This provision tends to support the implication that section 13 of this act is repealed or superseded by said Act March 1, 1895, c. 145.

**Repeal.**

Sec. 14. That section six hundred and ninety-one of the Revised Statutes of the United States and section three of an act entitled "An act to facilitate the disposition of cases in the Supreme Court, and for other purposes," approved February sixteen, eighteen hundred and seventy-five, be, and the same are hereby repealed. And all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act are hereby repealed.

Act March 3, 1891, c. 517, § 14, 26 Stat. 829.

Rev. St. § 691, repealed by this section, provided for the review of judgments of circuit courts in civil actions, when the matter in dispute exceeded the sum or value of $2,000, by the Supreme Court on writ of error. Section 3 of Act Feb. 16, 1875, c. 77, found in U. S. Comp. St. 1901, p. 525, under Rev. St. § 649, which is also repealed by this section, increased the amount required in order that judgments

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and decrees of circuit courts should be reviewed in the Supreme Court, from $2,000 to $5,000. But the jurisdiction of the Supreme Court and of the circuit courts in cases where the writ of error or the appeal was sued out or taken before July 1, 1891, was saved by Res. March 3, 1891, No. 17, set forth below.

**Appeals and writs of error from supreme courts of Territories.**

Sec. 15. That the circuit court of appeal in cases in which the judgments of the circuit courts of appeal are made final by this act shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of the several Territories as by this act they may have to review the judgments, orders, and decrees of the district court and circuit courts; and for that purpose the several Territories shall, by orders of the Supreme Court, to be made from time to time, be assigned to particular circuits.

Act March 3, 1891, c. 517, § 15, 26 Stat. 830.

This section providing for reviews by the circuit courts of appeals of judgments, etc., of Territorial courts in certain cases, leaves the review of judgments and decrees of those courts in other cases to be governed by the provisions relating thereto of Rev. St. § 702, which authorize such review by the Supreme Court, and subsequent statutes, particularly Act March 3, 1885, c. 355, found in U. S. Comp. St. 1901, p. 571, under Rev. St. § 702, which increases the amount of the sum or value of the matter in dispute, requisite for an appeal or writ of error, from $2,000 to $5,000.

**RES. MARCH 3, 1891, No. 17.**

Joint Resolution to Provide for the Organization of the Circuit Courts of Appeals. (26 Stat. 1115.)

**Time for first meetings of courts; jurisdiction of pending cases.**

Resolved, &c., That the first meetings of the several circuit courts of appeals mentioned in the act of Congress passed at this present session, entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," shall be held on the third Tuesday in June, A. D. eighteen hundred and ninety-one; and if, from any casualty, the first meeting of any of said courts shall fail to be so held on that day, the first meeting of any such court so failing to be held, shall be held on such day subsequent thereto as the chief justice, or any justice of the Supreme Court of the United States assigned to such circuit, shall direct: and be it further resolved, That nothing in said act shall be held or construed in anywise to impair the jurisdiction of the Supreme Court or any circuit court of the United States in any case now pending before it, or in respect of any case wherein the writ of error or the appeal shall have been sued out or taken to any of said courts before the first day of July, anno Domini, eighteen hundred and ninety-one.

Res. March 3, 1891, No. 17, 26 Stat. 1115.

This resolution changed to a later date the time fixed by Act March 3, 1891, c. 517, § 3, set forth above, for the first terms of the circuit courts of appeals, and extended until after that date the time within

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which appeals and writs of error might be taken to the circuit courts or to the Supreme Court, instead of to the circuit courts of appeals under section 4 of that act.

**ACT JULY 16, 1892, c. 196, § 1.**

**Duties of marshals of circuit courts of appeals to be performed by marshals for districts.**

That so much of section two of the act approved March third, eighteen hundred and ninety-one, to establish circuit courts of appeals as authorizes the appointment of a marshal to each of said courts at a salary of two thousand five hundred dollars be and the same is hereby, repealed, and the duties and powers imposed upon said marshals under the said act shall be performed by the United States marshals in and for the districts where terms of said courts may be held, and to this end said marshals shall be the marshals of said courts of appeals.

Act July 16, 1892, c. 196, § 1, 27 Stat. 222.

This is a provision of the legislative, executive, and judicial appropriation act for the fiscal year ending June 30, 1893, cited above.

**ACT FEB. 8, 1896, c. 14.**

An Act to Extend the Jurisdiction of the United States Circuit Court of Appeals, Eighth Circuit, over certain Suits now Pending therein on Appeal and Writ of Error from the United States Court in the Indian Territory. (29 Stat. 6.)

**Jurisdiction of circuit court of appeals for eighth circuit on writ of error or appeal from United States court in Indian Territory.**

Be it enacted, &c., That the jurisdiction of the United States circuit court of appeals for the eighth judicial circuit be, and is hereby, extended to all suits at law or equity now pending therein upon writ of error to or appeal from the United States court in the Indian Territory in all cases wherein such writ of error or appeal would have vested jurisdiction in said circuit court of appeals but for the Act of Congress approved March first, eighteen hundred and ninety-five, entitled "An Act to provide for the appointment of additional judges of the United States court in the Indian Territory, and for other purposes."

Act Feb. 8, 1896, c. 14, 29 Stat. 6.

Act March 1, 1895, c. 145, referred to in this act, by section 11 thereof establishes a court of appeals in the Indian Territory, with appellate jurisdiction over the courts therein, and provides for writs of error and appeals from final decisions of said appellate court to the circuit court of appeals for the eighth circuit. The jurisdiction of the circuit court of appeals, under Act March 3, 1891, c. 517, § 13, set forth above, having been thus transferred, wholly or in part, to the court of appeals in the Indian Territory, is saved by this act as to cases pending in the circuit court of appeals at the time of its passage.

Appeals and writs of error are to be taken from the court of appeals in the Indian Territory to the circuit court of appeals for the eighth circuit in the same manner as appeals or writs of error from the circuit courts, by Act March 3, 1905, c. 1479, § 12, set forth below.

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**ACT MAY 28, 1896, c. 252, § 1.**

**Terms of court for ninth circuit; messenger of court for eighth circuit.**

Circuit courts: * * That in the ninth judicial circuit in addition to the term or terms held in San Francisco, a term of the circuit court of appeals shall be held each year in two other places in said circuit, to be designated by the judges of said court. * *

For a messenger of the United States circuit court of appeals for the eighth judicial circuit, who shall also perform the duties of librarian and crier of said court, the sum of two thousand dollars as yearly compensation; said messenger shall also receive his necessary traveling and other expenses when said court shall hold a term at any other place than that of his residence, not to exceed, however, five dollars per day, and said messenger shall be appointed by the judges of said circuit court of appeals to serve during the pleasure of the court.

Act May 28, 1896, c. 252, § 1, 29 Stat. 177.

These are provisions of the legislative, executive, and judicial appropriation act for the year ending June 30, 1897, cited above. The term at San Francisco, referred to herein, is provided for by Act March 3, 1891, c. 517, § 3; and provisions relating to officers of the circuit courts of appeals are contained in section 2 of the same act, set forth above.

**ACT JAN. 20, 1897, c. 68.**

An Act to Withdraw from the Supreme Court Jurisdiction of Criminal Cases not Capital and Confer the Same on the Circuit Courts of Appeals. (29 Stat. 492.)

**Jurisdiction on appeal or writ of error in criminal cases.**

Be it enacted, &c., That so much of section five of the Act entitled "An Act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March third, eighteen hundred and ninety-one, as reads "in cases of conviction of a capital or otherwise infamous crime," be amended by striking out the words "or otherwise infamous," so that the same will read "in cases of conviction of a capital crime;" and that appeals or writs of error may be taken from the district courts or circuit courts to the proper circuit court of appeals in cases of conviction of an infamous crime not capital: Provided, That no case now pending in the Supreme Court or in which an appeal or writ of error shall have been taken or sued out before the passage of this Act shall be hereby affected, but in all such cases the jurisdiction of the Supreme Court shall remain, and said Supreme Court shall proceed therein as if this Act had not been passed.

Act Jan. 20, 1897, c. 68, 29 Stat. 492.

The amendment by this act of section 5 of Act March 3, 1891, c. 517, is incorporated in that section as set forth above.

Provisions for the review by the Supreme Court of final judgments in all cases of conviction of crime, the punishment of which provided by law is death, tried before any court of the United States, are contained in Act Feb. 6, 1889, c. 113, § 6, found in U. S. Comp. St. 1901, p. 569, following Rev. St. § 699.

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**ACT FEB. 19, 1897, c. 263.**

An Act to Amend the Act Creating the Circuit Court of Appeals in Regard to Fees and Costs, and for Other Purposes. (29 Stat. 536.)

**Costs and fees in circuit courts of appeals.**

Be it enacted, &c., That the second section of an Act to establish circuit courts of appeals, passed March third, eighteen hundred and ninety-one, be amended so that the clause therein which now reads, "The costs and fees in the Supreme Court now provided for by law shall be costs and fees in the circuit courts of appeals," shall read, "The costs and fees in each circuit court of appeals shall be fixed and established by said court in a table of fees, to be adopted within three months after the passage of this Act: Provided, That the costs and fees so fixed by any court of appeals shall not, with respect to any item, exceed the costs and fees now charged in the Supreme Court." Each circuit court of appeals shall, within three months after the fixing and establishing of costs and fees as aforesaid, transmit said table to the Chief Justice of the United States, and within one year thereof the Supreme Court of the United States shall revise said table, making the same, so far as may seem just and reasonable, uniform throughout the United States. The table of fees, when so revised, shall thereupon be in force for each circuit.

Act Feb. 19, 1897, c. 263, 29 Stat. 536.

The amendment by this act of section 2 of Act March 3, 1891, c. 517, is incorporated in that section as set forth above.

A previous provision authorizing the Supreme Court to prepare the tables of fees to be charged by the clerk of that court is contained in Act March 3, 1883, c. 143, found in U. S. Comp. St. 1901, p. 651, following Rev. St. § 846.

**ACT JUNE 9, 1902, c. 1071.**

An Act Providing that the Circuit Court of Appeals of the Eighth Judicial Circuit of the United States Shall Hold at Least One Term of Said Court Annually in the City of Denver, in the State of Colorado, or in the City of Cheyenne, in the State of Wyoming, on the First Monday in September in Each Year, and at the City of Saint Paul, in the State of Minnesota, on the First Monday in May in Each Year. (32 Stat. 329.)

**Additional terms of court for eighth circuit.**

Be it enacted, &c., That the circuit court of appeals of the eighth judicial circuit of the United States is hereby authorized and required to hold one term of said court annually in the city of Denver, in the State of Colorado, or in the city of Cheyenne, in the State of Wyoming, on the first Monday in September in each year, and is hereby authorized and required to hold one term of said court annually in the city of Saint Paul and State of Minnesota on the first Monday in May of each year.

Act June 9, 1902, c. 1071, § 1, 32 Stat. 329.

This provision is not to prevent the court from holding other terms, by section 3 of the act, set forth below.

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**Place of hearing appeals, writs of error, etc.**

Sec. 2. That all appeals, writs of error, and other appellate proceedings which may be taken or prosecuted from the circuit or district courts of the United States in the States of Colorado, Utah, and Wyoming, and the supreme court of the Territory of New Mexico, to the court of appeals of the eighth judicial circuit, shall be heard and disposed of by the said court of appeals at the term thereof hereinbefore provided for so to be held either at the city of Denver, in the State of Colorado, or at the city of Cheyenne, in the State of Wyoming, except that any case arising from said States and Territory may, by consent of all the parties thereto, be heard and decided at a term of said court other than the one to be held in the city of Denver, in the State of Colorado, or in the city of Cheyenne, in the State of Wyoming.

Act June 9, 1902, c. 1071, § 2, 32 Stat. 329.

**Other terms authorized.**

Sec. 3. That this Act shall not operate to prevent the said court from holding other terms in the aforesaid places or in such other places in the said eighth judicial circuit as said court may from time to time designate.

Act June 9, 1902, c. 1071, § 3, 32 Stat. 329.

**Amendment of previous provisions.**

Sec. 4. That chapter five hundred and seventeen of Twenty-sixth United States Statutes at Large is hereby amended in accordance with the provisions of this Act.

Act June 9, 1902, c. 1071, § 4, 32 Stat. 329.

**ACT JUNE 30, 1902, c. 1333.**

An Act Providing That the Circuit Court of Appeals of the Fifth Judicial Circuit of the United States Shall Hold at Least One Term of Said Court Annually in the City of Atlanta, in the State of Georgia, on the First Monday in October in Each Year. (32 Stat. 548.)

**Additional term of court for fifth circuit.**

Be it enacted, &c., That the circuit court of appeals of the fifth judicial circuit of the United States is hereby authorized and required to hold one term of said court annually in the city of Atlanta, in the State of Georgia, on the first Monday in October in each year.

Act June 30, 1902, c. 1333, § 1, 32 Stat. 548.

This provision is not to prevent the court from holding other terms, by section 3 of the act, set forth below.

Additional terms at other places are provided for by Act Dec. 18, 1902, c. 4, and Act Jan. 30, 1903, c. 335, set forth below.

**Place of hearing appeals, writs of error, etc.**

Sec. 2. That all appeals, writs of error, and other appellate proceedings which may, after the date of this Act, be taken or prosecuted



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from the circuit or district courts of the United States in the State of Georgia to the court of appeals of the fifth judicial circuit shall be heard and disposed of by the said court of appeals at the terms of the court held in Atlanta in pursuance of this Act: Provided, That nothing herein contained shall prevent the court from hearing appeals or writs of error wherever the said court shall sit in cases of injunctions and in all other cases which under the statutes and the rules, or in the opinion of the court, are entitled to be brought to a speedy hearing.

Act June 30, 1902, c. 1333, § 2, 32 Stat. 548.

**Other terms authorized.**

Sec. 3. That this Act shall not operate to prevent the said court from holding other terms in the city of Atlanta or in such other places in the said fifth judicial circuit as said court may from time to time designate.

Act June 30, 1902, c. 1333, § 3, 32 Stat. 548.

**Amendment of previous provisions.**

Sec. 4. That chapter five hundred and seventeen of Twenty-sixth United States Statutes at Large is hereby amended in accordance with the provisions of this Act.

Act June 30, 1902, c. 1333, § 4, 32 Stat. 548.

**Expenses of clerk.**

Sec. 5. That the clerk of said court is authorized and permitted to pay out of the fees and emoluments of his office, (one) the necessary expenses incurred by him in transporting from his office in New Orleans, Louisiana, to Atlanta, Georgia, and in transporting from Atlanta, Georgia, to New Orleans, Louisiana, the records, books, papers, files, dockets, and supplies necessary for the use of the court at its terms to be held in Atlanta, Georgia; (two) an allowance for actual expenses not exceeding ten dollars per day, to cover travel and subsistence, for each day he may be required to be present at Atlanta, Georgia, on business connected with his said office, such expenses and allowance to be approved and allowed by the senior circuit judge of the fifth judicial circuit.

Act June 30, 1902, c. 1333, § 5, 32 Stat. 548.

## ACT DEC. 18, 1902, c. 4.

An Act Providing That the Circuit Court of Appeals of the Fifth Judicial Circuit of the United States Shall Hold at Least One Term of Said Court Annually in the City of Fort Worth, in the State of Texas, on the First Monday in November in Each Year. (32 Stat. 756.)

**Additional term of court for fifth circuit.**

Be it enacted, &c., That the circuit court of appeals of the fifth judicial circuit of the United States is hereby authorized and required

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to hold one term of said court in the city of Fort Worth, in the State of Texas, on the first Monday in November in each year.

Act Dec. 18, 1902, c. 4, § 1, 32 Stat. 756.

This provision is not to prevent the court from holding other terms, by section 3 of the act, set forth below.

Additional terms at other places are provided for by Act June 30, 1902, c. 1333, set forth above, and Act Jan. 30, 1903, c. 335, set forth below.

**Place of hearing appeals, writs of error, etc.**

Sec. 2. That all appeals, writs of error, and other appellate proceedings which may, after the date of this Act, be taken or prosecuted from the circuit or district courts of the United States in the State of Texas to the court of appeals of the fifth circuit shall be heard and disposed of by the said court of appeals at the terms of the court held in Fort Worth in pursuance of this Act: Provided, That nothing herein contained shall prevent the court from hearing appeals or writs of error wherever the said court shall sit, in cases of injunctions and in all other cases which under the statutes and the rules, or in the opinion of the court, are entitled to be brought to a speedy hearing.

Act Dec. 18, 1902, c. 4, § 2, 32 Stat. 756.

**Other terms authorized.**

Sec. 3. That this Act shall not operate to prevent the said court from holding other terms in the city of Fort Worth or in such other places in the said fifth judicial district as said court may from time to time designate.

Act Dec. 18, 1902, c. 4, § 3, 32 Stat. 756.

**Amendment of previous provisions.**

Sec. 4. That chapter five hundred and seventeen of Twenty-sixth United States Statutes at Large is hereby amended in accordance with the provisions of this Act.

Act Dec. 18, 1902, c. 4, § 4, 32 Stat. 756.

**Expenses of clerk.**

Sec. 5. That the clerk of said court is authorized and permitted to pay, out of the fees and emoluments of his office, (one) the expenses incurred by him in transporting from his office in New Orleans, Louisiana, to Fort Worth, Texas, and in transporting from Fort Worth, Texas, to New Orleans, Louisiana, the records, books, papers, files, dockets, and supplies necessary for the use of the court at its terms to be held in Fort Worth, Texas; (two) an allowance for actual expenses not exceeding ten dollars per day to cover travel and subsistence for each day he may be required to be present at Fort Worth, Texas, on business connected with his said office, such expenses and allowance to be approved and allowed by the senior circuit judge of the fifth judicial circuit.

Act Dec. 18, 1902, c. 4, § 5, 32 Stat. 548.

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**ACT JAN. 30, 1903, c. 335.** [*As amended* 1904.]

An Act Providing That the Circuit Court of Appeals of the Fifth Judicial Circuit of the United States Shall Hold at Least One Term of Said Court Annually in the City of Montgomery, in the State of Alabama, on the First Monday in September in Each Year. (32 Stat. 784.)

**Additional term of court for fifth circuit.**

Be it enacted, &c., That the circuit court of appeals of the fifth judicial circuit of the United States is hereby authorized and required to hold one term of said court in the city of Montgomery, in the State of Alabama, on the third Monday in October in each year.

Act Jan. 30, 1903, c. 335, § 1, 32 Stat. 784. Act April 22, 1904, c. 1420, 33 Stat. 249.

The concluding words of this section, as originally enacted, "on the first Monday of September in each year," were stricken out, and the words, "on the third Monday in October in each year," inserted, by amendment by Act April 22, 1904, c. 1420, cited above.

This provision is not to prevent the court from holding other terms, by section 3 of the act, set forth below.

Additional terms at other places are provided for by Act June 30, 1902, c. 1333, and Act Dec. 18, 1902, c. 4, set forth above.

**Place of hearing appeals, writs of error, etc.**

Sec. 2. That all appeals, writs of error, and other appellate proceedings which may, after the date of this Act, be taken or prosecuted from the circuit or district courts of the United States in the State of Alabama to the court of appeals of the fifth circuit shall be heard and disposed of by the said court of appeals at the terms of the court held in Montgomery in pursuance of this Act: Provided, That nothing herein contained shall prevent the court from hearing appeals or writs of error wherever the said court shall sit, in cases of injunctions and in all other cases which under the statutes and the rules, or in the opinion of the court, are entitled to be brought to a speedy hearing.

Act Jan 30, 1903, c. 335, § 2, 32 Stat. 784.

**Other terms authorized.**

Sec. 3. That this Act shall not operate to prevent the said court from holding other terms in the city of Montgomery or in such other places in the said fifth judicial circuit as said court may from time to time designate.

Act Jan. 30, 1903, c. 335, § 3, 32 Stat. 784.

**Amendment of previous provisions.**

Sec. 4. That chapter five hundred and seventeen of Twenty-sixth United States Statutes at Large is hereby amended in accordance with the provisions of this Act.

Act Jan. 30, 1903, c. 335, § 4, 32 Stat. 784.

**Expenses of clerk.**

Sec. 5. That the clerk of said court is authorized and permitted to pay out of the fees and emoluments of his office (first) the expenses

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incurred by him in transporting from his office in New Orleans, Louisiana, to Montgomery, Alabama, and in transporting from Montgomery, Alabama, to New Orleans, Louisiana, the records, books, papers, files, dockets, and supplies necessary for the use of the court at its terms to be held in Montgomery, Alabama; (second) an allowance for actual expenses not exceeding ten dollars per day to cover travel and subsistence for each day he may be required to be present at Montgomery, Alabama, on business connected with his said office, such expenses and allowance to be approved and allowed by the senior circuit judge of the fifth judicial circuit.

Act Jan. 30, 1903, c. 335, § 5, 32 Stat. 784.

**ACT MARCH 4, 1904, c. 395.** [H. R. 10,145.]

An Act to Provide for Appeals, Writs of Error, and Other Appellate Proceedings from the Circuit and District Courts of Beaumont, in the Eastern District of Texas. (33 Stat. 59.)

**Place of hearing appeals, writs of error, etc.**

Be it enacted, &c., That all appeals, writs of error, and other appellate proceedings which may hereafter be taken or prosecuted from the circuit or district courts of the United States from the courts at Beaumont, Jefferson County, Texas, in the eastern judicial district of Texas, to the court of appeals of the fifth circuit shall be heard and disposed of by said court of appeals at the terms of court held in the city of New Orleans, in the State of Louisiana: Provided, That nothing herein contained shall prevent the court from hearing appeals or writs of error wherever the said court shall sit in cases of injunctions and in all other cases which under the statutes and the rules or in the opinion of the court are entitled to be brought to a speedy hearing.

Act March 4, 1904, c. 395, 33 Stat. 59.

**ACT MARCH 3, 1905, c. 1479, § 12.** [H. R. 17,474.]

**Appeals and writs of error from court of appeals in Indian Territory to circuit court of appeals for eighth circuit.**

That hereafter all appeals and writs of error shall be taken from the United States courts in the Indian Territory to the United States court of appeals in the Indian Territory, and from the United States court of appeals in the Indian Territory to the United States circuit court of appeals for the eighth circuit in the same manner as is now provided for in cases taken by appeal or writ of error from the circuit courts of the United States to the circuit court of appeals of the United States for the eighth circuit.

Act March 3, 1905, c. 1479, § 12, 33 Stat. 1081.
This section is part of the Indian appropriation act for the fiscal year ending June 30, 1906.

**ACT APRIL 14, 1906.**

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the seventh

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section of the Act of Congress entitled "An Act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March third, eighteen hundred and ninety-one, as amended by Act approved June sixth, nineteen hundred, be, and it is hereby, amended to read as follows:

"Sec. 7. That where, upon a hearing in equity in a district or in a circuit court, or by a judge thereof in vacation, an injunction shall be granted or continued, or a receiver appointed by an interlocutory order or decree, in any cause an appeal may be taken from such interlocutory order or decree granting or continuing such injunction, or appointing such receiver, to the circuit court of appeals: Provided, That the appeal must be taken within thirty days from entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court, or by the appellate court, or a judge thereof, during the pendency of such appeal: Provided further, That the court below may, in its discretion, require as a condition of the appeal an additional bond."

34 Stat. 116.

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# RULES

OF THE

# UNITED STATES CIRCUIT COURTS OF APPEALS.

## AS ORIGINALLY ADOPTED AND SUBSEQUENTLY AMENDED

**Together with order of Supreme Court providing Table of Fees and Instructions as to Applications for Writs of Certiorari under Act of March 3, 1901.**



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# ORIGINAL RULES.

[The rules of the circuit courts of appeals as originally adopted were substantially the same in the different circuits, and are here printed in full. Where the rule as originally adopted differed from the rule as here given, it will be found printed in full under its respective circuit; and all amendments, repeals, and additions are likewise shown under the head of the respective circuits.]

## 1.

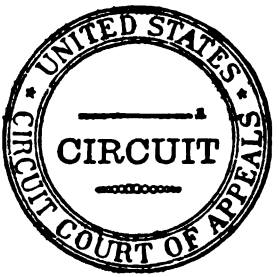
### NAME.

The court adopts "United States Circuit Court of Appeals for the ———[1] Circuit" as the title of the court.

## 2.

### SEAL.

The seal shall contain the words "United States" on the upper part of the outer edge; and the words "Circuit Court of Appeals" on the lower part of the outer edge, running from left to right; and the words "———[1] Circuit" in two lines, in the center, with a dash beneath.




## 3.

### TERMS.

[See this rule under the head of the particular circuit.]

## 4.

### QUORUM.

1. If at any term a quorum does not attend on any day appointed for holding it, any judge who does attend may adjourn the court from

[1] [First, second, third, fourth, fifth, sixth, seventh, eighth, and ninth, respectively.]



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time to time, or, in the absence of any judge, the clerk may adjourn the court from day to day. If, during a term, after a quorum has assembled, less than that number attend on any day, any judge attending may adjourn the court from day to day until there is a quorum, or may adjourn without day.

2. Any judge attending when less than a quorum is present may make all necessary orders touching any suit, proceeding, or process, depending in or returned to the court, preparatory to hearing, trial, or decision thereof.

## 5.

### CLERK.

1. The clerk's office shall be kept at the place designated in the act creating the court at which a term shall be held annually.

2. The clerk shall not practice, either as attorney or counselor, in this court, or in any other court, while he shall continue to be clerk of this court.

3. He shall, before he enters on the execution of his office, take an oath in the form prescribed by section 794 of the Revised Statutes, and shall give bond in a sum to be fixed, and with sureties to be approved, by the court, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments, and determinations of the court. A copy of such bond shall be entered on the journal of the court, and the bond shall be deposited for safe-keeping as the court may direct.

4. He shall not permit any original record or paper to be taken from the court-room or from the office without an order from the court.

## 6.

### MARSHAL, CRIER, AND OTHER OFFICERS.

1. Every marshal and deputy-marshal shall, before he enters on the duties of his appointment, take an oath in the form prescribed by section 782 of the Revised Statutes, and the marshal shall, before he enters on the duties of his office, give bond in a sum to be fixed, and with sureties to be approved, by the court, for the faithful performance of said duties by himself and his deputies. Said bond shall be filed and recorded in the office of the clerk of the court.

2. The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may, from time to time, order.

## 7.

### ATTORNEYS AND COUNSELORS.

All attorneys and counselors admitted to practice in the supreme court of the United States, or in any circuit court of the United States, shall become attorneys and counselors in this court on taking

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an oath or affirmation in the form prescribed by rule 2 of the supreme court of the United States, and on subscribing the roll; but no fee shall be charged therefor.

## 8.

### PRACTICE.

The practice shall be the same as in the supreme court of the United States, as far as the same shall be applicable.

## 9.

### PROCESS.

All process of this court shall be in the name of the president of the United States, and shall be in like form and tested in the same manner as process of the supreme court.

## 10.

### BILL OF EXCEPTIONS.

The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions, and allowed by the court.

## 11.

### ASSIGNMENT OF ERRORS.

The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of error shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record, and be printed with it. When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

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## 12.

### OBJECTIONS TO EVIDENCE IN THE RECORD.

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant, exhibit, or translation, found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

## 13.

### SUPERSEDEAS AND COST BONDS.

1. Supersedeas bonds in the circuit and district courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but, in all suits where the property in controversy necessarily follows the suit, as in real actions and replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity in all such cases will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit and just damages for delay, and costs and interest on the appeal.

2. On all appeals from any interlocutory order or decree granting or continuing an injunction in a circuit or district court, the appellant shall, at the time of the allowance of said appeal, file with the clerk of such circuit or district court a bond to the opposite party, in such sum as such court shall direct, to answer all costs if he shall fail to sustain his appeal.

## 14.

### WRITS OF ERROR, APPEALS, RETURN, AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.

2. In all cases brought to this court by writ of error or appeal to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court, shall be filed.

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4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit or district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

5. All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return-day fall in vacation or in term-time and be served before the return-day.

6. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in general admiralty rule No. 52 of the supreme court.

## 15.

### TRANSLATIONS.

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceeding, in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceeding, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will thereupon remand it back to the inferior court, in order that a translation may be there supplied and inserted in the record.

## 16.

### DOCKETING CASES.

1. It shall be the duty of the plaintiff in error or appellant to docket the case, and file the record thereof with the clerk of this court, by or before the return-day, whether in vacation or in term-time. But, for good cause shown, the justice or judge who signed the citation, or any judge of this court, may enlarge the time by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed, upon producing a certificate, whether in term-time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case, and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and, if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error

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or appellee at any time thereafter, the case shall stand for argument at the term.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

## 17.

### DOCKET.

The clerk shall enter upon a docket all cases brought to and pending in the court in their proper chronological order, and such docket shall be called at every term, or adjourned term; and if a case is called for hearing at two terms successively, and upon the call at the second term neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

## 18.

### CERTIORARI.

No certiorari for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such certiorari must be made at the first term of the entry of the case; otherwise the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

## 19.

### DEATH OF A PARTY.

1. Whenever, pending a writ of error or appeal to this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and, if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that, unless such representatives shall become parties within sixty days, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed, and, if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if it be erroneous: provided, however, that a copy of every such order shall be personally served on said representatives at least thirty days before the expiration of such sixty days.

2. When the death of a party is suggested, and the representatives of the deceased do not appear within ten days after the expiration of such sixty days, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

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3. When either party to a suit in a circuit or district court of the United States shall desire to prosecute a writ of error or appeal to this court from any final judgment or decree rendered in the circuit or district court, and, at the time of suing out such writ of error or appeal, the other party to the suit shall be dead, and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some state or territory of the United States, or in the District of Columbia, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And, within thirty days after the filing of the record in this court, the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some state or territory of the United States, or in the District of Columbia, and stating therein the name and character of such representative, and the state or territory or district in which such representative resides; and, upon such suggestion, he may on motion obtain an order that, unless such representative shall make himself a party within ninety days, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed if the same be erroneous: provided, however, that a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least thirty days before the expiration of such ninety days: provided, also, that in every such case, if the representative of the deceased party does not appear within ten days after the expiration of such ninety days, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate: and provided, also, that the said representative may at any time, before or after said suggestion, come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

## 20.

### DISMISSING CASES.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the

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case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

## 21.

### MOTIONS.

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. One hour on each side shall be allowed to the argument of a motion, and no more without special leave of the court granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

## 22.

### PARTIES NOT READY.

1. Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff called, and the writ of error or appeal dismissed.

2. Where the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the case.

3. When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff.

## 23.

### PRINTING RECORDS.

The counsel for the plaintiff in error or appellant shall print and file with the clerk of the court, at least six days before the case is called for argument, twenty copies of the record, unless a different order as to such printing is made by the court, either of its own motion, or upon application made at least ten days before the case is called for argument; and shall furnish three copies of the printed record to the adverse party at least six days before the argument. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed, but the court may direct the printing of other parts of the record. If the record shall not have been printed when the case is reached in the regular call of the docket, the case may be dismissed. In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given.

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## 24.

### BRIEFS.

1. The counsel for the plaintiff in error or appellant shall file with the clerk of this court, at least six days before the case is called for argument, twenty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in order here stated:

(1) A concise abstract or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised.

(2) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and, in cases brought up by appeal, the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report, and the action of the court upon it.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief at least three days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and, when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

6. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but, if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.



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## 25.

### ORAL ARGUMENTS.

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. Two hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion: provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

## 26.

### FORM OF PRINTED RECORDS, ARGUMENTS, AND BRIEFS.

All records, arguments, and briefs, printed for the use of the court, must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume.

## 27.

### COPIES OF RECORDS AND BRIEFS.

The clerk shall carefully preserve in his office one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, and arguments filed therein.

## 28.

### OPINIONS OF THE COURT.

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

3. Opinions printed under the supervision of the judge delivering the same need not be copied by the clerk into a book of records; but, at the end of each term, the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded, within the meaning of this rule.

## 29.

### REHEARING.

A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave

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granted during the term; and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a judge who concurred in the judgment desires it, and a majority of the court so determines.

## 30.

### INTEREST.

1. In cases where a writ of error is prosecuted in this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the state or territory where such judgment was rendered.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent., in addition to interest, shall be awarded upon the amount of the judgment.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

4. In cases in admiralty, damages and interest may be allowed, if specially directed by the court.

## 31.

### COSTS.

1. In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be taxable in that court as costs in the case.

4. Neither of the foregoing sections shall apply to cases where the United States are a party, but in such cases no costs shall be allowed in this court for or against the United States.

5. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

6. In all cases certified to the supreme court or removed thereto by certiorari or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the supreme court.

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## 32.

### MANDATE.

In all cases finally determined in this court, a mandate, or other proper process in the nature of a procedendo, shall be issued, on the order of this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

## 33.

### CUSTODY OF PRISONERS ON HABEAS CORPUS.

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance, as hereinafter provided.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

## 34.

### MODELS, DIAGRAMS, AND EXHIBITS OF MATERIAL.

1. Models, diagrams, and exhibits of material, forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the marshal of this court at least ten days before the case is heard or submitted.

2. All models, diagrams, and exhibits of material, placed in the custody of the marshal for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and, if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

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# AMENDED RULES.

[Subsequent amendments to the rules of the United States Circuit Courts of Appeals will be published in future volumes of these reports.]

## FIRST CIRCUIT.

[The rules as originally adopted, where identical with those of the other circuits, will be found at pages xxv–xxxvi. Only such originally adopted rules as were not identical with those of the other circuits, and amendments, changes, and repeals of the rules as originally adopted, are given under this head, reference being made to others in their proper places.]

### 1.

[As originally adopted. See page xxv.]

### 2.

[As originally adopted. See page xxv.]

### 3.

[This rule as originally adopted read as follows: "Terms. One term of this court shall be held annually at the city of Boston on the first Tuesday of October, and shall be adjourned to such times and places as the court may from time to time designate." It was amended, September 15, 1892, to take effect the first Tuesday in November following, Mr. Justice Gray, Judge Colt, and Judge Putnam being present, so as to read as follows:]

#### TERMS AND SESSIONS.

One term of this court shall be held annually at the city of Boston at ten o'clock in the forenoon on the first Tuesday of October. Stated sessions thereof shall be there held at the same hour on the first Tuesday of every month, and may be adjourned to such times and places as the court may from time to time designate. But, unless otherwise ordered, any adjournment shall be held to have been made to the first day of the next stated session.



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## 4.

[Amendment, adopted October 4, 1898, to take effect on the 1st day of December following; Mr. Justice Gray, Judge Colt, and Judge Putnam being present.]

### QUORUM.

1. In the absence of a quorum on any day appointed for holding a term, or on any day to which the court is adjourned, any judge who attends shall adjourn the court from day to day; or, if no judge is present, the clerk shall so adjourn; and, in the absence of all the judges and the clerk, the marshal or his deputy shall so adjourn. But the court may, from time to time, as provided in rule 3, enter orders directing an adjournment, or adjournments, for longer periods than from day to day, or sine die.

2. Any judge attending when less than a quorum is present may make all necessary orders touching any suit, proceeding or process, depending in or returned to the court, preparatory to hearing, trial or decision thereof.

## 5.

[As originally adopted. See page xxvi.]

## 6.

[Amendment, adopted September 15, 1892, to take effect the first Tuesday in November following; Mr. Justice Gray, Judge Colt, and Judge Putnam being present.]

### MARSHAL AND OTHER OFFICERS.

The marshal shall be in attendance during the sessions of the court, with such number of bailiffs, messengers, and other officers as the court may from time to time order.

## 7.

[As originally adopted. See page xxvi.]

## 8.

[As originally adopted. See page xxvii.]

## 9.

[As originally adopted. See page xxvii.]

## 10.

[As originally adopted. See page xxvii.]

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## 11.

[As originally adopted. See page xxvii.]

## 12.

[As originally adopted. See page xxviii.]

## 13.

### SUPERSEDEAS AND COST BONDS.

1. Supersedeas bonds in the Circuit and District Courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but, in all suits where the property in controversy necessarily follows the suit, as in real actions and replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity in all such cases will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit and just damages for delay, and costs and interest on the appeal.

2. On an appeal from an interlocutory order or decree, the appellant shall, at the time of the allowance thereof, file a bond to the adverse party in such sum as the judge who allowed the appeal shall direct, to answer all costs if he shall fail to sustain his appeal.

## 14.

### WRITS OF ERROR, APPEALS, RETURN, AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.

2. In all cases brought to this court by writ of error or appeal to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions and other proceedings, which are necessary to the hearing in this court, shall be filed.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any Circuit or District Court, that original papers of any kind should be inspected in this court upon writ of error or ap-

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peal, such presiding judge may make such rule or order for the safe-keeping, transporting and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

5. All appeals, writs of error and citations, must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.

6. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in general admiralty rule No. 52 of the Supreme Court.

The testimony in such a record shall embrace the viva voce proof in the District Court, if the same, or the substance thereof, has been reduced to writing with the approval of its judge. The reasonable cost of so reducing the same to writing may be taxed as a part of the costs of the record, except so far as allowed as costs in the District Court.

7. Further proof in instance causes in admiralty shall include only that which could not with diligence have been had at the trial below, or which was there rejected, or was omitted through misapprehension, provided the evidence be accompanied with a certificate of counsel showing reasonable excuse for the misapprehension. Except by order of the court first obtained, merely cumulative proofs shall not be so taken; but for this purpose the evidence of witnesses who had different duties, interests, or opportunities of observation, will not ordinarily be held cumulative in cases of collision or other maritime tort.

8. Such further proof may be taken after the appeal is allowed, in the manner provided by law for depositions de bene esse, or by an examiner appointed by any circuit or district judge, or selected by the parties, or upon interrogatories and commissions as provided in rule 13 of the Circuit Courts of this circuit, mutatis mutandis. It must be taken and filed forthwith after it is obtainable, but it cannot, except by order of the court, be taken or filed within thirty days before any session at which the cause may be heard, nor thereafterwards until the cause has been postponed to the next term or session.

9. Objections to further proof shall be filed with the magistrate and returned with the evidence. Within seven days after the evidence is taken, the party so objecting may file in print a motion to suppress the same, with a copy of the objections and a brief. The other party may within seven days thereafter file in print a counter-statement and brief. The objections and counter-statement, so far as they contain matters of fact dehors the record, shall be verified by affidavit. The court will consider the objections in advance of the trial, or in connection therewith, as it may in each case determine, and without oral argument, and will order suppressed evidence not rightfully taken. The party taking the evidence so suppressed shall pay the costs arising therefrom, including the printing thereof.

10. Nothing herein shall exclude applications for leave to take further proof, or objections thereto, in advance of the taking thereof, or objections touching the formalities of taking it; but the latter must be brought to the attention of the court forthwith after the evidence is filed.

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## 15.

### TRANSLATIONS.

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony or other proceeding, in a foreign language, and the record does not also contain a translation of such document, paper, testimony or other proceeding, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will thereupon remand it back to the inferior court, in order that a translation may be there supplied and inserted in the record.

## 16.

### DOCKETING AND DISMISSING CASES.

1. The plaintiff in error or appellant shall docket the case, and file the record thereof, on or before the return day, whether in vacation or in term time. But, for good cause shown, the justice or judge who signed the citation, or any circuit or district judge, may enlarge the time, the order of enlargement to be filed in this court.

2. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the case docketed and dismissed whether in term time or vacation upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the case, the return day of the citation, and that the writ of error or appeal was duly sued out or allowed. And the plaintiff in error or appellant shall not be entitled to docket the case, or file the record, after the same shall have been docketed or dismissed under this rule, unless by the order of the court after notice to the adverse party.

But the defendant in error or appellee may, at his option, docket the case and file the record; and, if the case is docketed and the record filed by the plaintiff in error or appellant within the time prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument.

3. On the filing of the record, the appearance of the counsel for the party docketing the case shall be entered.

## 17.

### DOCKET AND CALENDARS.

1. The clerk shall enter and number on the docket all cases consecutively, in their proper chronological order.

2. He shall print at least twenty days before the first Tuesday of October and of January, and the second Tuesday of April, a calendar of all the pending cases, arranged by districts in the following order: Maine, New Hampshire, Rhode Island, Massachusetts.

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## 18.

[As originally adopted. See page xxx.]

## 19.

[As originally adopted. See page xxx.]

## 20.

### DISMISSING CASES BY AGREEMENT.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

## 21.

### MOTIONS.

1. The motion day shall be the first Tuesday of every stated session of the court, and any other Tuesday while the court shall remain in session.

2. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

3. All motions to dismiss writs of error or appeals (except motions to docket and dismiss under rule 16) or to advance cases, or for a writ of certiorari, and other special motions, shall be printed, and be accompanied by printed briefs.

4. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party or his counsel.

5. Any motion, of which counsel shall have given notice to the clerk in advance, shall be entered on the clerk's list in the order in which he receives notice thereof, and shall have priority in that order before other motions, unless otherwise specially ordered by the court.

6. Half an hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court granted before the argument begins.

## 22.

### CALL AND ORDER OF THE CALENDAR.

1. On the first Tuesday of October and of January, and on the second Tuesday of April, the court, except as may, from time to time, be otherwise ordered, will commence calling cases for argument in

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the order in which they stand on the calendar, and proceed from day to day during the session in the same order; but no case from the district of Massachusetts shall be called before the second Tuesday of the session.

2. Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff called, and the writ of error or appeal dismissed.

3. Where the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff and to give judgment according to the right of the case.

4. When a case is reached in the regular call of the calendar, and there is no appearance for either party, the case may be dismissed at the cost of the plaintiff.

5. If either of the parties is ready when the case is called, the same may be heard; and, if neither party is ready, the case may be dismissed, or be postponed to the next session, as the court may order.

6. If a case is called for hearing at two stated sessions successively and, on the call at the second session, neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

7. The court will not hear arguments on Mondays or Saturdays, unless for special cause it shall so order.

8. Five cases are liable to be called on the coming in of the court on each day.

9. Revenue and other cases which concern the United States, and which also involve or affect some matter of general public interest, and criminal cases, and cases once adjudicated by this court on their merits and again brought up by writ of error or appeal, may be advanced by order of the court.

10. Two or more cases involving the same question may, by leave of the court, be heard together, to be argued as one case or more, as the court may order.

11. No agreement of counsel to pass or postpone a case, or to substitute one case for another, shall become effective except on leave.

## 23.

**[Amendment, adopted September 15, 1892, to take effect the first Tuesday in November following; Mr. Justice Gray, Judge Colt, and Judge Putnam being present. Paragraph 8, under the amendment of September, 1892, provided for an additional fee of 15 cents per page to be paid the clerk for preparing the record and for all other incidental services relating to the subject-matter of this rule. This paragraph was repealed by the amendment of October 4, 1898, to take effect on the 1st day of December following; Mr. Justice Gray, Judge Colt, and Judge Putnam being present.]**

### PRINTING RECORDS.[2]

1. In all cases, the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking to the clerk,

[2]See order of the supreme court establishing a table of fees for the circuit courts of appeals, page cxxxix.

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with surety to his satisfaction, for the payment of his fees, or otherwise satisfy him in that behalf.

2. The clerk shall cause an estimate to be made of the cost of printing the record, and of his fee for preparing it for the printer, and shall notify to the party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed when the case is reached at the regular call of the docket, the case may be dismissed.

3. Upon payment by either party of the amount estimated by the clerk, twenty-five copies of the record shall be printed under the clerk's supervision, for the use of the court and of counsel.

4. The clerk shall take to the printer the original transcript on file, but shall cause copies to be made for the printer of such original papers sent up under rule 14, or other original papers, as are necessary to be printed.

5. The clerk shall supervise the printing, and see that the printed copies are properly indexed; and he shall distribute printed copies to the judges and the reporter, from time to time, as required, and three copies to the counsel for each party. An additional number of copies may be printed at the request of either party for his own use and at his own expense, or by order of the court.

6. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed; but the court may direct the printing of other parts of the record.

7. The clerk may receive from either party, and use as parts of the printed record, so far as the same may be of proper and convenient size and type, any portions which have been printed in any other court, and also printed copies of patents and other exhibits, allowing the party furnishing the same such sum therefor as the clerk deems reasonable, to be added to and form a part of the cost of printing.

8. If the actual cost of printing the record, together with the fee of the clerk, shall be less than the amount estimated and paid, the amount of the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fee shall exceed the estimate, the excess shall be paid to the clerk before the delivery of a printed copy to either party or his counsel.

9. In case of reversal, affirmance, or dismissal, with costs, the cost of printing the record and the clerk's fee shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

## 24.

[As originally adopted. See page xxxiii.]

## 25.

[As originally adopted. See page xxxiv.]

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## 26.

[As originally adopted. See page xxxiv.]

## 27.

[As originally adopted. See page xxxiv.]

## 28.

[As originally adopted. See page xxxiv.]

## 29.

[Amendment, adopted October 4, 1898, to take effect on the 1st day of December following; Mr. Justice Gray, Judge Colt, and Judge Putnam being present.]

### REHEARING.

A petition for a rehearing after judgment may be filed at the term at which the judgment is entered, and within one calendar month after such entry, and not later, unless by leave granted during the term. It must be in print, in the form and style required by rule 26, and it must briefly and distinctly state its grounds, and be supported by a certificate of counsel. It will not be granted, or permitted to be argued, unless a judge who concurred in the judgment desires it and a majority of the court so determines. Provided, whenever a judgment is entered within less than a month before the term adjourns, the petition may be filed within a month after the entry of judgment, and with the same effect after the term as though filed before the adjournment.

## 30.

[This rule as originally adopted is the same as rule 30, on page xxxv, except that the words "or territory" are omitted after the word "state."]

## 31.

### COSTS.

1. In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court.

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4. The cost of the transcript of the record from the court below shall be taxable in that court as costs in the case.

5. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

6. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

7. In all cases certified to the Supreme Court or removed thereto by certiorari or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the Supreme Court.

## 32.

[Amendment, adopted October 4, 1898, to take effect on the 1st day of December following; Mr. Justice Gray, Judge Colt, and Judge Putnam being present.]

### MANDATE.

In every case finally determined, a mandate, or other proper process in the nature of a procedendo, shall be issued to the court below, for the purpose of informing that court of the proceedings in this court, so that further proceedings may be had in the court below as to law and justice may appertain. Such mandate, or other process, may issue at any time on the order of the court; but, unless otherwise ordered, it shall issue as of course after two calendar months from the entry of judgment, unless a petition for a rehearing has been filed and remains undisposed of.

## 33.

[As originally adopted. See page xxxvi.]

## 34.

[As originally adopted. See page xxxvi.]

## 35.

### ERROR IN CRIMINAL CASES.

On or after the allowance of a writ of error in a criminal case cognizable by this court, the justice or judge who allowed the writ, or the court which entered the judgment, or any judge thereof, shall have power to admit to bail the plaintiff in error, according to the rules of law applicable to his case.

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## 36.

### RULES IN BANKRUPTCY.

October Term, 1898.

At a session of the United States Circuit Court of Appeals for the First Circuit, held in the city of Boston, in the district of Massachusetts, on the thirty-first day of May, Anno Domini eighteen hundred and ninety-nine.

Present: Hon. Le BARON B. COLT, Circuit Judge, and Hon. WILLIAM L. PUTNAM, Circuit Judge.

It is ordered as follows:

1. On the filing of a petition for the exercise of the power of superintendence and revision vested in this court by the act to establish a uniform system of bankruptcy throughout the United States, approved July 1, 1898, or under any acts which may hereafter be passed in addition thereto or amendatory thereof, the clerk shall issue, as of course, an order to show cause, returnable two weeks from the date thereof, which shall be served by copy on each of the adverse parties named in the petition as a person against whom relief is desired, or his solicitor in the proceeding in the district court, at least one week before the return day of the order, which service shall be made by the marshal or his deputy in the district where the party or solicitor served resides.

2. Within one calendar month after the return day of the order to show cause, either party may demur, plead or answer; but the determination of any demurrer, plea or answer, shall be final, and no order to plead over will be allowed; and any party may secure in his answer all the advantages of a demurrer or plea, or both, by inserting therein the proper allegations therefor. No demurrer shall be general, and no cause of demurrer shall be allowed unless specifically set forth therein.

3. There shall be no pleadings in reply by the petitioner; but any new matter properly in reply shall be available without the same being pleaded in the petition, or otherwise.

4. A motion to dismiss may be filed within the time allowed for a demurrer, plea or answer; or the subject matter thereof, if it relates to the substance of the proceeding or to the jurisdiction of the court, may be availed of on demurrer, plea or answer, by proper allegations; and whenever a motion to dismiss is seasonably filed, the time for filing demurrer, plea or answer, will run from the day on which an order may be entered overruling the motion. Every motion to dismiss shall be filed in print, accompanied with a printed brief; and each of the opposing parties shall forthwith be served by the clerk, through the mail or otherwise, with a copy of the motion and of the brief, and he may file, in print, a brief in reply within two weeks. At the expiration of the time allowed for filing the brief in reply, the motion and briefs will be distributed by the clerk to the circuit judges, and to the district judge, senior in commission, who is not disqualified. Thereupon, the motion will be disposed of by the court on the briefs,

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unless, at its own suggestion, or for good cause shown, the court shall order oral arguments.

5. So much of rule 14 as relates to viva voce proofs in the district courts, or to further proof in instance causes in admiralty shall apply to appeals and petitions authorized by the act aforesaid, or by acts hereafter passed additional thereto or amendatory thereof; provided any record on any such appeal or petition may be supplemented by any matter agreed to in writing by the parties and filed with the clerk.

6. The rules with reference to records, printing and briefs, and all other rules, except as herein modified, shall apply to the proceedings to which this order relates.

7. Nothing herein shall prevent the court, from time to time, from making, for special cause, orders diminishing or enlarging the times named herein, or any other orders suitable to expedite the proceeding or to prevent injustice.

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# SECOND CIRCUIT.

[The rules as originally adopted, where identical with those of the other circuits, will be found at pages xxv–xxxvi. Only such originally adopted rules as were not identical with those of the other circuits, and amendments, changes and repeals of the rules originally adopted, are given under this head, reference being made to others in their proper places.]

## 1.

[As originally adopted. See page xxv.]

## 2.

[As originally adopted. See page xxv.]

## 3.

[This rule as originally adopted reads as follows:]

### TERMS.

One term of this court shall be held annually at the city of New York on the third Tuesday of October, and shall be adjourned to such times and places as the court may from time to time designate.

## 4.

[As originally adopted. See page xxv.]

## 5.

[As originally adopted. See page xxvi.]

## 6.

[As originally adopted. See page xxvi.]

## 7.

[As originally adopted. See page xxvi.]

## 8.

[As originally adopted. See page xxvii.]

## 9.

[As originally adopted. See page xxvii.]



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10.

[As originally adopted. See page xxvii.]

11.

[As originally adopted. See page xxvii.]

12.

[As originally adopted. See page xxviii.]

13.

[As originally adopted. See page xxviii.]

14.

[As originally adopted. See page xxviii.]

15.

[As originally adopted. See page xxix.]

16.

[As originally adopted. See page xxix.]

17.

[As originally adopted. See page xxx.]

18.

[As originally adopted. See page xxx.]

19.

[As originally adopted. See page xxx.]

20.

[As originally adopted. See page xxxi.]

21.

[As originally adopted. See page xxxii.]

22.

[As originally adopted. See page xxxii.]

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## 23.

[Amendment adopted October 19, 1891; Mr. Justice Blatchford, Judge Wallace, and Judge Lacombe being present.]

### PRINTING RECORDS.[a]

On the filing of the transcript, in every case, the clerk shall forthwith cause 15 copies of the same to be printed, and shall furnish 3 copies thereof to each party, at least 30 days before the argument, and shall file 9 copies thereof in his office. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed, but the court may direct the printing of other parts of the record. The clerk shall be entitled to demand of the appellant, or plaintiff in error, the cost of printing the record, before ordering the same to be done. If the record shall not have been printed when the case is reached for argument, for failure of a party to advance the costs of printing, the case may be dismissed. In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given.

## 24.

[Amendment adopted October 19, 1891; Mr. Justice Blatchford, Judge Wallace, and Judge Lacombe being present.]

### BRIEFS.

1. The counsel for the plaintiff in error or appellant shall file with the clerk of this court, at least 20 days before the case is called for argument, 10 copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in order here stated:

(1) A concise abstract or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised.

(2) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and, in cases brought up by appeal, the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report, and the action of the court upon it.

[a] See order of the supreme court establishing a table of fees for the circuit courts of appeals, page cxxxix.

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(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk, at least 10 days before the case is called for hearing, 10 copies of his printed brief, one of which shall, on application, be furnished to each of the counsel on the opposite side. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and, when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

6. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but, if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

## 25.

### ORAL ARGUMENTS.

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. Upon writs of error, appeals in admiralty, appeals from orders granting a preliminary injunction and in appeals in customs cases, one hour on each side, and in other cases one hour and a half will be allowed. But in all cases where there are no difficult questions of law and the amount involved does not exceed $500, and in appeals and petitions for review in bankruptcy, only one-half hour on each side will be allowed. No more time than above specified will be allowed without special leave of the court granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion, provided always that a fair opening of the case shall be made by the party having the opening and closing arguments.

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## 26.

### FORM OF PRINTED RECORDS, ARGUMENTS, AND BRIEFS.

All arguments and briefs printed for the use of the court must be printed upon a page eleven inches long by seven inches wide and must have a margin of at least two inches in width.

[As amended December 7, 1899.]

## 27.

[As originally adopted. See page xxxiv.]

## 28.

[As originally adopted. See page xxxiv.]

## 29.

[As originally adopted. See page xxxiv.]

## 30.

[As originally adopted. See page xxxv. See, also, order of the supreme court establishing a table of fees for the circuit courts of appeals, page cxxxix.]

## 31.

[As originally adopted. See page xxxv.]

## 32.

[As originally adopted. See page xxxvi.]

## 33.

[As originally adopted. See page xxxvi.]

## 34.

[As originally adopted. See page xxxvi.]

[The following announcements and orders have been made:]

The court announces that hereafter the sessions of the court will commence at 10:30 a. m., and continue until 1:30 p. m.

[Dated October 25, 1892.]

Motions will be heard during the sessions of this court on Mondays, at 10:30 a. m. All notes of issue for the motion calendar must

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be filed with the clerk not later than the Friday next preceding the motion day.

[Dated March 24, 1893.]

## 35.

[Adopted May 3, 1897; Judge Wallace, Judge Lacombe, and Judge Shipman being present.]

1. An appeal or writ of error from a circuit court or a district court to this court in the cases provided for in sections 6 and 7 of the act entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," approved March 3, 1891, and acts to amend said act approved February 18, 1895, and January 20, 1897, may be allowed in term time or vacation by the circuit justice or by any circuit judge within the circuit, or by any district judge within his district, and the proper security be taken and the citation be signed by him, and he may also grant a supersedeas and stay of execution or of proceedings, pending such writ of error or appeal.

2. Where such writ of error to this court is allowed in the case of a conviction of an infamous crime or in any other criminal case in which it will lie, the circuit court or district court, or any justice or judge thereof, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed.

## 36.

1. In all cases the plaintiff in error or appellant on docketing a case and filing a record, shall enter into an undertaking with the clerk, for the payment of his fees or otherwise satisfy him in that behalf.

2. At the expiration of ten days after a case has been decided, the order or decree thereon will be entered by the court, and the clerk will thereupon prepare and tax the bill of costs and issue the mandate. Within said ten days the parties may file with the clerk their proposed orders or decrees and bills of costs with proof of service of the same upon the opposing attorneys.

## 37.

In the preparation of briefs any citations made from Federal Cases must be accompanied by the citation of the original report of the case, or, when the case is not elsewhere reported than in the Federal Cases, by a statement to that effect.

## 38.

Petitions to review orders in bankruptcy filed under the provisions of section 24b of the bankruptcy act, must be filed and served within ten days after the entry of the order sought to be reviewed, and a tran-

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script of the record of the proceedings in the bankruptcy court of the matter to be reviewed must be filed and the cause docketed within thirty days thereafter, but the judge of the bankruptcy court may for good cause shown enlarge the time for filing the petition or record, the order of enlargement to be made and filed with the clerk of this court before the expiration of the times hereby limited for filing the petition and record respectively.

## RULES IN ADMIRALTY.

[The following rules in admiralty were adopted May 20, 1892, to take effect on July 1, 1892, and were readopted, with amendments, October 5, 1892; Mr. Justice Blatchford, Judge Wallace, and Judge Lacombe being present. The amendments of October 5, 1892, are noted in their proper places.]

### I.

### APPEALS AND NEW PLEADINGS.

An appeal to the circuit court of appeals shall be taken by filing in the office of the clerk of the district court, and serving on the proctor of the adverse party, a notice, signed by the appellant or his proctor, that the party appeals to the circuit court of appeals from the decree complained of.

[If the appellant desires to make new pleadings or take new evidence on the appeal, his notice of appeal must so state. If the notice does not so state,][4] the appeal shall be heard on the pleadings and evidence in the district court, unless the appellate court, on motion, otherwise order.

### II.

### NOTICE AND BOND.

Section 1. When a notice of appeal is served, the appellant shall file in the clerk's office of the district court a bond for costs of the appeal, with sufficient surety in the sum of $250, conditioned that the appellant shall prosecute his appeal to effect, and pay the costs if the appeal is not sustained. Such security shall be given within ten days after filing the notice, or the appeal shall be deemed abandoned, and the decree of the court below enforced, unless otherwise ordered by a judge of this court.

Sec. 2. And if the appellant desires to stay the execution of the decree of the court below, the bond which he shall give shall be a bond with sufficient surety in such further sum as the judge of the district court or a judge of this court shall order, conditioned that he will abide by and perform whatever decree may be rendered by this court in the cause, or on the mandate of this court by the court below.

Sec. 3. The appellant shall, on filing either of such bonds, give notice of such filing, and of the names and residence of the sureties;

[4] The words in brackets were stricken out by amendment October 5, 1892.

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and if the appellee, within two days, excepts to the sureties, they shall justify, on notice, within two days after such exception.

## III.

### REVIEW IN PART ONLY.

The appellant may also, at his option, state in his notice of appeal that he desires only to review one or more questions involved in the cause, which questions must be clearly and succinctly stated; and he shall be concluded in this behalf by such notice, and the review upon such an appeal shall be limited to such question or questions.

## IV.

### APOSTLES ON APPEAL TO CONTAIN.

Section 1. The apostles, on an appeal to this court, shall, in cases where a general notice of appeal is served, consist of the following:

(1) A caption exhibiting the proper style of the court and the title of the cause, and a statement showing the time of the commencement of the suit; the names of the parties, setting forth the original parties, and those who have become parties before the appeal, if any change has taken place; the several dates when the respective pleadings were filed; whether or not the defendant was arrested, or bail taken, or property attached or arrested, and, if so, an account of the proceedings thereunder; the time when the trial was had, and the name of the judge hearing the same; whether or not any question was referred to a commissioner or commissioners, and, if so, the result of the proceedings and report thereon; the date of the entry of the interlocutory and final decrees; and the date when the notice of appeal was filed.

(2) All the pleadings, with the exhibits annexed thereto.

(3) All the testimony and other proofs adduced in the cause.

(4) The interlocutory decree, and any order of the court which appellant may desire to have reviewed on the appeal.

(5) Any report of a commissioner or commissioners, to which exception may have been taken, with the order or orders of the court respecting the same, and the exceptions to the report, and so much of the testimony taken in the proceeding as may be necessary to a review of the exceptions.

(6) All opinions of the court, whether upon interlocutory questions or finally deciding the cause.

(7) The final decree, and the notice of appeal. [And

(8) The assignments of error.][5]

Sec. 2. All other papers shall be omitted unless otherwise ordered by the judge who heard the cause.

Sec. 3. Where the appellant shall appeal specially, and seek only to review one or more questions involved in the cause, the apostles

[5] The words in brackets were added by amendment October 5, 1892.

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may, by stipulation between the proctors for the respective parties, contain only such papers and proceedings and evidence as are necessary to review the questions raised by the appeal.

## V.

### CERTIFYING RECORDS.

The appellants shall, within thirty days after giving notice of appeal, procure to be filed in this court the apostles certified by the clerk of the district court, or, in case of a special appeal, the stipulated record, with the certification by the said clerk of all papers contained therein on file in his office.

## VI.

### IF APPEARANCE OF APPELLEE NOT ENTERED.

If the appellee does not cause his appearance to be entered in this court within ten days after service on his proctor of notice that the apostles are filed in this court, the appellant may proceed ex parte in the cause, and have such decree as the nature of the case may demand.

## VII.

### NEW ALLEGATIONS, ETC.

Upon sufficient cause shown, this court, or any judge thereof, may allow either appellant or appellee to make new allegations, or pray different relief, or interpose a new defense, or take new proofs. Application for such leave must be made within fifteen days after the filing of the apostles, and upon at least four days' notice to the adverse party.

## VIII.

### NEW PLEADINGS—NEW TESTIMONY.

If leave be granted to make new allegations, pray different relief, or interpose a new defense, the moving party shall, within ten days thereafter, serve such new pleading, duly verified, on the adverse party, who shall, if such pleading be a libel, within twenty days answer on oath.

If leave be given to take new testimony, the same may be taken and filed within thirty days after the entry of the order granting such leave, and the adverse party may take and file counter testimony within twenty days after such filing.

## IX.

### NEW TESTIMONY—HOW TAKEN.

Such testimony shall be taken by deposition before any United States commissioner or notary public, upon reasonable notice in

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writing given to the opposite party; or by commission issued out of this court, with interrogatories annexed. Upon proper cause shown, the court may grant an open commission.

## X.

### PRINTING NEW PLEADINGS AND TESTIMONY.

If new pleadings are filed or testimony taken in this court, the same shall also be printed and furnished by the clerk, as in the 23d general rule provided.

## XI.

### MOTIONS.

All motions shall be made upon at least four days' notice.

## XII.

### WRIT OF INHIBITION.

A writ of inhibition may be awarded by this court on motion of the appellant, to stay proceedings in the court below, when circumstances require.

## XIII.

### MANDAMUS.

A mandamus may, in like manner, be obtained, to compel a return of the apostles when unreasonably delayed by the clerk or court below.

## XIV.

### CASES TO BE PLACED ON DOCKET.

Each case shall be placed on the docket as soon as the printing [of the apostles][6] is completed by the clerk.

## XV.

### BRIEFS.

Section 1. Counsel for the appellant shall file with the clerk of this court, at least twenty days before the case is called for argument, ten copies of a printed brief, and shall, at the same time, serve two copies thereof on the proctors of record, or on the counsel

[6] The words in brackets were added by amendment October 5, 1892.

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engaged upon the opposite side. This brief shall contain, in order here stated:

(1) A statement of the nature of the appeal, the court from which the appeal is taken, and a concise abstract or statement of the case, presenting succinctly the questions involved, and the manner in which they were raised.

(2) If the pleadings have been amended in this court, or new proofs have been taken, it shall be stated what amendments have been made, and in what respect the new proofs have changed, or tended to change, the case as made in the court below.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the folios of the record or to the numbers of the questions, and the authorities relied upon in support of each point.

Sec. 2. The counsel for the appellee shall file with the clerk of the court ten printed copies of his brief, and serve two copies thereof at least ten days before the case is called for argument. His brief shall be of a like character with that required of the appellant, and, in case new proofs are taken on behalf of the appellee, the brief shall so state, and wherein the new proofs have changed the case as made in the court below.

Sec. 3. The reasonable expense of printing briefs shall be an item of taxable costs.

## XVI.

### MANDATES.

The decrees of this court shall direct that a mandate issue to the court below.

## XVII.

### EXTENSION OF TIME.

The time specified in the foregoing rules for any proceeding may be extended by order of a judge of this court.

## XVIII.

### WHEN RULES OF DISTRICT COURTS TO APPLY.

In all matters in civil causes of admiralty and maritime jurisdiction, not expressly provided for by the foregoing rules of this court, the rules of practice of the district court of the district in which the cause was decided, being in force at the time, (not being inconsistent with these rules,) will be adopted so far as may seem proper.

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## XIX.

[This rule was added by amendment October 5, 1892.]

### WHAT GENERAL RULES SHALL BE DEEMED ADMIRALTY RULES.

The following of the general rules of this court, and no others, shall be deemed admiralty rules, viz.: Rules 3, 4, 5, 6, 7, 9, 11, 12; section 4 of rule 14; rules 15, 16, 17, 18, 19, 20, 21, 22, 23; section 5 of general rule 24; rules 25, 26, 27, 28, 29; section 4 of rule 30; rules 31, 32, 34, and 36.

[The following announcement was made May 9, 1893:]

Hereafter the provision contained in subdivision 6 of section 1 of rule IV in admiralty, that "all opinions of the court, whether upon interlocutory questions or finally deciding the cause," shall be certified up with the apostles, must be strictly complied with, and such opinions must be printed.

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# THIRD CIRCUIT.

[The rules as originally adopted, where identical with those of the other circuits, will be found at pages xxv–xxxvi. Only such originally adopted rules as were not identical with those of the other circuits, and amendments, changes, and repeals of the rules as originally adopted, are given under this head, reference being made to others in their proper places.]

## 1.

[As originally adopted. See page xxv.]

## 2.

[As originally adopted. See page xxv.]

## 3.

The terms of this court shall commence and be held on the first Tuesday in March, and the first Tuesday in October, at the city of Philadelphia.

[Amended June 15, 1904.]

## 4.

[As originally adopted. See page xxv.]

## 5.

[As originally adopted. See page xxvi.]

## 6.

[As originally adopted. See page xxvi.]

## 7.

[This rule as originally adopted reads as follows:]

### ATTORNEYS AND COUNSELORS.

All attorneys and counselors admitted to practice in the supreme court of the United States, or in any circuit court of the United States, shall become attorneys and counselors in this court on taking an oath or affirmation in the form prescribed by rule 2 of the supreme court of the United States, and on subscribing the roll; but no fee shall be charged therefor; and all attorneys and counselors of the circuit court of the United States for the Third circuit shall be attorneys and counselors of this court without taking any further oath.

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8.

[As originally adopted. See page xxvii.]

9.

[As originally adopted. See page xxvii.]

10.

[As originally adopted. See page xxvii.]

11.

[As originally adopted. See page xxvii.]

12.

[As originally adopted. See page xxviii.]

13.

[As originally adopted. See page xxviii.]

14.

[The rule as originally adopted reads as follows:]

WRITS OF ERROR, APPEALS, RETURN, AND RECORD.

1. The clerk of the court to which any writ of error may be directed, upon being paid or tendered his fees therefor, shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.

2. In all cases brought to this court by writ of error or appeal to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit or district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

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5. All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.

6. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in general admiralty rule No. 52 of the supreme court.

## 15.

[As originally adopted. See page xxix.]

## 16.

[As originally adopted. See page xxix.]

## 17.

[And now, March 12, 1900, it is ordered that the following additional rule be adopted:]

In making up the docket for argument for the term cases continued at former terms and all remanets shall be placed at the head of the argument list in the order with respect to each other in which they stood on the docket at the last preceding term.

[The following order was made December 7, 1892:]

It is ordered that hereafter there shall be but a single court docket, and no "special docket," and cases shall be placed thereon as follows:

I. Those cases on the trial or hearing of which both of the circuit judges shall be competent to sit.

II. Those cases on the trial or hearing of which the circuit judge oldest in commission, shall be competent to sit.

III. Those cases on the trial or hearing of which the circuit judge youngest in commission, but not the other circuit judge, shall be competent to sit.

Under and with respect to each of these three general divisions, there shall be placed first in order upon the docket those cases in which the district judge assigned for the term shall be competent to sit, and immediately thereafter the cases in which he shall not be competent to sit.

Subject to the foregoing, cases shall be arranged in proper chronological order as heretofore.

## 18.

[As originally adopted. See page xxx.]

## 19.

[As originally adopted. See page xxx.]

## 20.

[As originally adopted. See page xxxi.]

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## 21.

[As originally adopted. See page xxxii.]

## 22.

[As originally adopted. See page xxxii.]

## 23.

[This rule as originally adopted was the same as rule 23, on page xxxii, except that it read "ten copies of the record," in place of "twenty copies of the record." It was amended September 22, 1892, by substituting "twenty" for "ten." It was again amended December 7, 1893, so as to read as follow:]

### PRINTING RECORDS.

1. On the filing of the transcript, the clerk shall forthwith cause twenty copies of the record to be printed, and shall furnish three copies thereof to each party at least six days before the case is called for argument, and shall file fourteen copies thereof in his office. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed, but the court may direct the printing of other parts of the record. The clerk may demand of the plaintiff in error or appellant the cost of printing the record before ordering the same to be done. If the record shall not have been printed when the case is reached in the regular call of the docket because of the failure of a party to advance the cost of printing, the case may be dismissed. In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given.

2. The clerk shall receive from either party, and use as parts of the printed record, so far as the same may be of proper and convenient size and type, any portions which may have been printed in any other court, and also printed copies of patents and other exhibits, allowing the party furnishing the same such sum therefor as the clerk deems reasonable, to be added to and form a part of the cost of printing.

[March 18, 1895, the following order was made:]

Ordered that, except upon special allowance by the court or a judge, no cause shall be placed on the docket for argument unless the transcript shall have been filed with the clerk, under rule 23, at least 10 days before the first day of the term.

## 24.

[This rule as originally adopted was the same as rule 24, on page xxxiii, except that it read "ten" for "twenty," in sections 1 and 3. It was amended September 22, 1892, by changing "ten" to "twenty," so as to conform to such rule.]

## 25.

[As originally adopted. See page xxxiv.]

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26.

[As originally adopted. See page xxxiv.]

27.

[As originally adopted. See page xxxiv.]

28.

[This rule as originally adopted reads as follows:]

OPINIONS OF THE COURT.

1. All written opinions delivered by the court shall be delivered to the clerk and recorded.

2. Opinions printed under the supervision of the judge delivering the same need not be copied by the clerk into a book of records; but, at the end of each term, the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes; and, when so bound, they shall be deemed to have been recorded, within the meaning of this rule.

29.

[As originally adopted. See page xxxiv.]

30.

[This rule as originally adopted is the same as rule 30, page xxxv, except that the words "or territory" are omitted after the word "state."]

31.

[As originally adopted. See page xxxv. With the order of the Supreme Court establishing a table of fees for the Circuit Courts of Appeals, with the following amendment, adopted as paragraph 7. See page cxxxix.]

7. Ordered, that the table of fees and costs in the Circuit Courts of Appeals, established in pursuance of the act of Congress of February 19, 1897, by order of January 10, 1898, be, and the same is hereby, amended as to the item for "Preparing the record for the printer, indexing the same, supervising the printing and distributing the copies, for each printed page of the record and index, .15," by substituting twenty-five cents in place of fifteen cents, for each printed page, so that said order as amended shall read as follows:

32.

[As originally adopted. See page xxxvi.]

33.

[As originally adopted. See page xxxvi.]

34.

[As originally adopted. See page xxxvi.]



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## FOURTH CIRCUIT.

[The rules as originally adopted, where identical with those of the other circuits, will be found at pages xxv–xxxvi. Only such originally adopted rules as were not identical with those of the other circuits, and amendments, changes, and repeals of the rules originally adopted, are given under this head, reference being made to the others in their proper places.]

### 1.

[As originally adopted. See page xxv.]

### 2.

[As originally adopted. See page xxv.]

### 3.

TERMS.

There shall be held in the city of Richmond, Virginia, three regular terms of this court; one on the first Tuesday of February, one on the first Tuesday of May, and one on the first Tuesday of November, in each year.

It is ordered, that hereafter special sessions of this court be held at Richmond, Virginia, on the second Tuesday of every month of the year, except in those months in which regular terms of the court are now designated by rule to be held. During said sessions such orders, judgments or decrees as may be necessary concerning pending cases may be considered and disposed of, opinions in cases theretofore argued may be filed and decrees and judgments relating thereto entered, mandates issued, and any such further action taken as is authorized by the statute in such case made and provided.

If at any such special session no judge shall be in attendance, the clerk shall adjourn the court until the next day, or to such time as the senior circuit judge shall direct, and in case no direction be made, to the next session or term of the court.

[February 16, 1907.]

### 4.

[As originally adopted. See page xxv.]

### 5.

[As originally adopted. See page xxvi.]

### 6.

MARSHAL, CRIER, AND OTHER OFFICERS.

The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may, from time to time, order.

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7.

ATTORNEYS AND COUNSELORS.

All attorneys and counselors admitted to practice in the Supreme Court of the United States, or in any Circuit Court of the United States, shall become attorneys and counselors in this court on taking an oath or affirmation in the form prescribed by rule 2 of the Supreme Court of the United States, subscribing the roll, and on payment of a fee of $5.

8.

[As originally adopted. See page xxvii.]

9.

[As originally adopted. See page xxvii.]

10.

[As originally adopted. See page xxvii.]

11.

[As originally adopted. See page xxvii.]

12.

[As originally adopted. See page xxviii.]

13.

[As originally adopted. See page xxviii.]

14.

[As originally adopted. See page xxviii.]

15.

[As originally adopted. See page xxix.]

16.

[As originally adopted. See page xxix.]

17.

DOCKET.

1. The clerk shall enter upon a docket all cases brought to and pending in the court in their proper chronological order, and shall

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print a docket containing all pending cases at each term of the court, and such docket shall be called at every term, or adjourned term; and if a case is called for hearing at two terms successively, and upon the call at the second term neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellants, unless sufficient cause is shown for further postponement.

2. All cases where the record has been printed and copies thereof furnished to the counsel as provided in rule 23 shall stand for argument at the term or adjourned term holden next after the docketing of the case.

## 18.

[As originally adopted. See page xxx.]

## 19.

[As originally adopted. See page xxx.]

## 20.

[As originally adopted. See page xxxi.]

## 21.

[As originally adopted. See page xxxii.]

## 22.

[As originally adopted. See page xxxii.]

## 23.

[Amendment adopted May 19, 1898.]

1. Hereafter all records shall be printed under the supervision of the clerk, by such printer and at such rate as the court may designate.

2. Upon the payment of the estimated cost of printing, together with the supervising fees as established by law (which amounts shall be deposited with the clerk within ten days after notice thereof), the clerk shall cause to be printed thirty copies of the record, twenty copies of which shall be filed for the use of the court, three copies furnished to the adverse party, and the remaining copies delivered to the appellant or plaintiff in error at least ten days before the term or adjourned term.

3. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed, but the court may direct the printing of other parts of the record.

4. If the record shall not have been printed when the case is reached in the regular call of the docket, the case may be dismissed.

5. In case of reversal, affirmance, or dismissal, with costs, the amount paid for the printing of the record and the clerk's fees for supervising the same, shall be taxed against the party against whom costs are given.

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## 24.

[Amendment adopted February 4, 1892.]

### BRIEFS.

1. The counsel for plaintiff in error or appellant shall file with the clerk of this court, at least ten days before every term or adjourned term, twenty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in order here stated:

(1) A concise abstract or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised.

(2) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and, in cases brought up by appeal, the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report, and the action of the court upon it.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record, and the authorities relied upon in support of each point. When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief, at least three days before the term or adjourned term. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error, not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and, when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

6. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but, if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

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## 25.

[As originally adopted. See page xxxiv.]

## 26.

[Amendment adopted February 4, 1892.]

### FORM OF PRINTED RECORDS, ARGUMENTS, AND BRIEFS.

All records, arguments, and briefs printed for the use of this court shall be in small pica type, 24 pica ems to a line, with an index, and a suitable cover, containing the title of the court and cause, the court from which the case is brought into this court, and the number of the case. Size of pages to be 9¼x6¼ inches, except that in patent cases the size of the pages shall be 10¾x7⅝ inches; that is to say, large enough to bind in copies of patent-office drawings and specifications without folding. So much of the record as was printed in the court below may be used in this court if it conforms to this rule.

## 27.

[Amended May 29, 1896, so as to read as follows:]

### COPIES OF RECORDS AND BRIEFS.

The clerk shall cause to be bound two copies of the printed record in every case, and of all printed motions, briefs and arguments filed therein; one copy to be carefully preserved in his office, and one copy for the use of the court library.

## 28.

[Amended May 29, 1896, so as to read as follows:]

### OPINIONS OF THE COURT.

1. All opinions delivered by the court shall be printed under the supervision of the judge delivering the same, or of one of the circuit judges, the cost of such printing to be paid by the clerk out of the revenues of his office and charged to the litigants in the respective cases, to be taxed and allowed as other costs.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

3. The clerk of this court shall from time to time cause two sets of the printed opinions of this court to be bound in a substantial manner into volumes, one set to be kept in the clerk's office and one set to be kept in the court library.

## 29.

### REHEARING.

A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted

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during the term; and must be printed, and briefly and distinctly state its grounds, and be supported by a certificate of counsel; and will not be granted, or permitted to be argued, unless a judge who concurred in the judgment desires it, and a majority of the court so determined. But such petition shall not operate to stay the mandate or other process provided for in rule 32, except by special order of the court.

## 30.

[As originally adopted. See page xxxv.]

## 31.

### COSTS.

1. In all cases where any suit shall be dismissed in court, except when the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be taxable in that court as costs in the case.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

5. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

6. In all cases certified to the Supreme Court, or removed thereto by certiorari or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the Supreme Court.

7. In pursuance of the act of Congress of February 19, 1897 (29 Stat. 536, c. 263), the following table of fees and costs in the Circuit Court of Appeals has been established, to take effect on the first day of March, A. D. 1898:

[See page cxxxix.]

## 32.

### MANDATE.

In all cases finally determined in this court, a mandate or other proper process, in the nature of a procedendo, shall be issued to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain. Such mandate, or other process, may issue at any time on the order of the court; but, unless otherwise or-

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dered, it shall issue as of course after the expiration of twenty days from the date of the judgment or decree.

## 33.

[As originally adopted. See page xxxvi.]

## 34.

### MODELS, DIAGRAMS, AND EXHIBITS OF MATERIAL.

1. Models, diagrams, and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the clerk of this court at least ten days before the case is heard or submitted.

2. All models, diagrams, and exhibits of material placed in the custody of the clerk for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the clerk to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and, if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

## 35.

[Adopted May 29, 1903.]

### SATURDAY CONFERENCE DAY.

The clerk in making his docket shall not set down for argument any cause for any Saturday of the term for which such docket is intended, and this court will meet on said days for consultation only.

## 36.

### BANKRUPTCY.

1. Upon the filing of the petition for review as provided for in section 24b of the act to establish a uniform system of bankruptcy throughout the United States, approved July 1, 1898, the clerk of this court shall docket the cause, and shall forthwith serve a certified copy of the petition upon the respondent or respondents, or his or their solicitor, through the mail or otherwise, together with a notice to the respondent or respondents, to answer, demur, or move to dismiss the said petition, within fifteen days from the date of such notice.

2. The petitioner shall cause a certified transcript of the record and proceedings of the bankruptcy court of the matter to be reviewed to be filed in the clerk's office of this court within thirty days from the date of the filing of the said petition.

3. Upon the filing of such transcript of the record the clerk of this court shall proceed to cause the record to be printed as provided for in

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the twenty-third rule of this court and furnish counsel on both sides with three copies each.

4. And such causes shall stand for hearing in their regular order. But either side may, upon ten days' notice given to the opposing counsel, have the cause heard, either at term time, or in vacation, or in chambers, upon the briefs, unless at its own suggestion, or for good cause shown, the court shall order oral argument.

5. That all causes coming up by appeal as provided in section 25 of said bankruptcy act shall stand for hearing in this court, either in term time or in vacation, and may be called up by either party upon ten days' notice, as provided in section 4 of this rule.

6. All rules of this court (except as herein modified) shall apply to the proceedings in bankruptcy to which this rule relates.

7. Nothing herein shall prevent the court, from time to time, from making, for special cause, orders diminishing or enlarging the times named herein, or any other order suitable to expedite the proceeding or to prevent injustice.

[Adopted November 23, 1899.]

## INSTRUCTIONS AS TO TAKING APPEALS, SUING OUT WRITS OF ERROR, MAKING UP RECORDS, ETC.

### METHOD OF TAKING APPEALS.

Writs of error and citations are no longer made returnable to the term day of the appellate court, but are made returnable not exceeding thirty days from the day of signing the citation, whether that day, which is the return day, fall in vacation or in term time; and the record must be filed in the clerk's office of this court before the return day, unless the time be enlarged as provided in section 1 of rule 16. In that case the order of enlargement must be filed with the clerk of this court.

Rule 11, entitled "Assignment of Errors," requires the plaintiff in error, or appellant, to file with the court below, with his petition for the writ of error or appeal, an assignment of errors, etc. This practically abolishes the necessity of pursuing the old method of praying appeals in "open court"; and all appeals and writs of error should be prayed for by petition in writing addressed to the court below, or to the judge in vacation, who allows the writ or the appeal, by an order in writing, approves the appeal or supersedeas bond, and signs the citation.

In cases brought up by writ of error, from either the Circuit or District Courts, the clerk of the Circuit Court, or the clerk of this court, issues the writ of error, which writ fixes the return day of the writ to this court, and the citation should bear the same return day. But in cases of appeal (in admiralty or in equity) the citation alone fixes the return day.

All appeals, therefore, whether by writ of error or appeal, should hereafter be taken in the following manner:

1. Petition in writing for the appeal, or writ of error, addressed to the court below, or the judge thereof in vacation.

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2. The petition must be accompanied with an assignment of errors, and a prayer for reversal.

3. Appeal or writ of error bond, approval thereof, and the signing of the citation by the judge allowing the appeal or writ.

4. Order in writing of the judge allowing the writ of error or appeal.

5. Issuing the writ of error by the clerk of the Circuit Court, or of this court.

6. In case it is desired to have the writ of error issued by the clerk of this court, a certified copy of the petition and order allowing the writ, under the seal of the court, with a fee of $5 for issuing it, must be transmitted to the clerk of this court, and the writ will be issued and forwarded to the clerk of the court below.

All of the above papers and proceedings should be filed with the clerk of the lower court, and incorporated into and certified up in the record by him to this court, except the writ of error and the citation, the originals of which, after having been duly served, must be attached to and bound in the record at their respective places. (For service of writ of error see section 1007, Rev. St.)

Rules of this court, blank writs of error, appeal and supersedeas bonds, citations, and orders of appearance may be had of the clerks of the lower courts or of the clerk of this court upon application.

## MAKING UP RECORDS.

In making up a transcript of the record, clerks are requested to make a distinct title or heading to each paper or proceeding copied into the record, with the date of filing the same, or the date of such proceeding, and to write upon but one side of the paper in a clear, legible hand. And a complete index should be made and attached to the record at the beginning of it.

In order to have uniformity, records should be commenced with the style and the term of the court at which the judgment or decree is entered, after the following form:

"The United States of America,

"——— District of ———, to wit:

"At a Circuit (or District) Court of the United States for the ——— district of ———, begun and held at the court-house in the city of ———, on the first Monday of ———, being the ——— day of the same month, in the year of our Lord one thousand, nine hundred and ———.

"Present: The Honorable ———, Circuit Judge (or ——— Judge) of the ——— District of ———.

"Among other were the following proceedings, to-wit:

| | |
|---|---|
| A. B.<br>v.<br>C. D. | In Equity (or)<br>In Admiralty (or)<br>At Law. |

"Bill of Complaint (or)

"Libel (or)

"Declaration (or Complaint)

"Filed ———, 190— (date of filing)."

(Copy same with endorsements, and any accompanying papers and exhibits, and so on with every paper or proceeding in the case.)

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Every paper or proceeding should have a proper heading or title stating what follows, and the date of the filing of the paper, or of the proceeding.

A complete record, as required by rule 14, must be made in all cases (for record in admiralty cases see section 6 of that rule), but as to the general order of making up a record, the following examples are given:

IN EQUITY.

1. Style of Court as Above.
2. Bill of Complaint, etc.
3. Process.
4. Marshal's Return.
5. Answer.
6. Replication.
7. Testimony and Exhibits for Complainant.
8. Testimony and Exhibits for Defendant.
9. Testimony and Exhibits in Rebuttal (if any).
10. Opinion.
11. Decree.
12. Petition for Appeal.
13. Assignment of Errors.
14. Appeal Bond and Approval.
15. Order Allowing Appeal.
16. Citation.
17. Clerk's Certificate.

IN ADMIRALTY.

1. Style of Court as Above.
2. Libel.
3. Process.
4. Marshal's Return.
5. Claim.
6. Stipulation.
7. Answer.
8. Testimony and Exhibits for Libellants.
9. Testimony and Exhibits for Respondent.
10. Testimony and Exhibits in Rebuttal (if any).
11. Opinion.
12. Decree.
13. Petition for Appeal.
14. Assignment of Errors.
15. Appeal Bond and Approval.
16. Order Allowing Appeal.
17. Citation.
18. Clerk's Certificate.

AT LAW.

1. Style of Court as Above.
2. Declaration.
3. Process.
4. Marshal's Return.
5. Plea or Demurrer, etc.
6. Joining of Issue.
7. Impaneling Jury.
8. Verdict.
9. Judgment.
10. Bill of Exceptions.
11. Petition for Writ of Error.
12. Assignment of Errors.
13. Bond and Approval.
14. Order Allowing Writ.
15. Writ of Error.
16. Citation.
17. Clerk's Certificate.

The numerical order of the above list of proceedings may be transposed whenever the order of the proceeding is different.

It is impossible to give information and direction to cover the details of every case for there are not two cases alike; but the above covers the substantial parts of every case.

While a full record is necessary, yet it is expected that counsel on both sides will exercise care that no matter not necessary to a full and complete review of the case shall be put into the record. Whenever any agreement shall be entered into by counsel with regard to the making up, or the printing of the record under rule 23, the agreement must be copied into the record.

In making up records in admiralty cases the following should be omitted (see rule 52 of the Supreme Court, in admiralty):

1. The continuances.

2. All motions, rules, and orders not excepted to which are merely preparatory for trial.

3. The commissions to take depositions, notices therefor, their captions, and certificates of their being sworn to, unless some exception to a deposition in the district court was founded on some one or more of these; in which case, so much of either of them as may be involved

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in the exception shall be set out. In all other cases it shall be sufficient to give the name of the witness and to copy the interrogatories and answers, and to state the name of the commissioner, and the place where and the date when the deposition was sworn to; and, in copying all depositions taken on interrogatories, the answer shall be inserted immediately following the question.

All records are transmitted to the appellate court by order of the court below; and if such order is not expressed in writing, it is implied, and the clerk should always enter immediately preceding his certificate the following order:

"And thereupon it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Fourth Circuit; and the same is transmitted accordingly.

"Teste: ————————, Clerk."

Then comes the general certificate of the clerk, in the usual form, that the foregoing is a full and true record, etc., with the seal of the court attached.

## DOCKETING CASES AND PRINTING RECORDS.

Upon a record being filed, the case is docketed and put upon the calendar for argument at the next term, or adjourned term, occurring thereafter, provided the record has been or can be printed ten days before the said term or adjourned term, as provided in rule 23. All records must be printed under the supervision of the clerk of this court.

Counsel transmitting a record to this court must accompany the same with an order for their appearance for the appellant or plaintiff in error, and also with a deposit of $25 for account of costs of this court, and the names and addresses of the attorneys on both sides.

The clerk of this court will, immediately upon a record being filed, send to the counsel an estimate of the cost of printing, supervising fees, etc., which amount must be deposited, either in cash or by New York exchange, with the clerk within ten days after notice. See rule 23.

It is important that records should be made up and forwarded to this office as promptly as possible after the appeal or writ of error is allowed, and not held until the near approach of the next term.

Defendants in error, or appellees, are required to make a deposit of $20.00, at the time of entering their appearance by attorney, for account of costs to be incurred by them in this court. In case of affirmance, or dismissal, when all costs shall have been paid by the plaintiff in error, or appellant, the said deposit will be returned. This is applicable to all cases except when the United States is defendant in error or appellee.

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# FIFTH CIRCUIT.

[The rules as originally adopted, where identical with those of the other circuits, will be found at pages xxv–xxxvi. Only such originally adopted rules as were not identical with those of the other circuits, and amendments, changes, and repeals of the rules as originally adopted, are given under this head, reference being made to the others in their proper places.]

## 1.

[As originally adopted. See page xxv.]

## 2.

[As originally adopted. See page xxv.]

## 3.

[Ordered January 12, 1905, that rule 3 be amended so as to read as follows:]

A session of this court shall be held annually at the city of Atlanta, Georgia, on the first Monday in October; at the city of Montgomery, Alabama, on the third Monday in October; at the city of Ft. Worth, Texas, on the first Monday in November; at the city of New Orleans, Louisiana, on the third Monday in November, and shall be adjourned to such other time and places as the court may from time to time order and designate.

## 4.

[As originally adopted. See page xxv. See, also, rule 36, page lxxxv.]

## 5.

[This rule as originally adopted reads as follows:]

### CLERK.

1. The clerk's office shall be kept in the city of New Orleans.

2. The clerk shall not practice, either as attorney or counselor, in this court, or in any other court, while he shall continue to be clerk of this court.

3. He shall, before he enters on the execution of his office, take an oath in the form prescribed by section 794 of the Revised Statutes, and shall give bond in the sum of ten thousand dollars ($10,000), and with sureties to be approved by the court, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments, and determinations of the court. A copy of such bond shall be entered on the journal of the court, and the bond shall be deposited for safe-keeping as the court may direct.

4. He shall not permit any original record or paper to be taken from the court room or from the office without an order from the court.

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## 6.

### MARSHAL, CRIER, AND OTHER OFFICERS.

The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may, from time to time, order.

## 7.

### ATTORNEYS AND COUNSELORS.

All attorneys and counselors admitted to practice in the Supreme Court of the United States, or any Circuit Court of the United States, upon filing certificate of such admission with the clerk of this court, and upon taking an oath or affirmation in the following form, viz:

"I, ———, do solemnly swear (or affirm) that I will demean myself as an attorney and counselor of this court uprightly, and according to law, and that I will support the Constitution of the United States."

—(a copy of which shall be filed with the clerk), shall become attorneys and counselors of this court; provided, however, that any attorney or counselor eligible to admission as an attorney and counselor of this court may be admitted to practice, on motion in open court, upon taking the oath or affirmation as prescribed, and subscribing the roll.

On each admission the clerk will collect ten dollars ($10.00) to be applied to the purchase of law books for the use of the court and bar.

[As amended December 18, 1900.]

## 8.

[As originally adopted. See page xxvii.]

## 9.

[As originally adopted. See page xxvii.]

## 10.

[As originally adopted. See page xxvii.]

## 11.

[As originally adopted. See page xxvii.]

## 12.

[As originally adopted. See page xxviii.]

## 13.

[As originally adopted. See page xxviii.]

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## 14.

### WRITS OF ERROR, APPEALS, RETURN, AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.

2. In all cases brought to this court by writ of error or appeal to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court, shall be filed.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit or district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safekeeping, transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

**[Ordered, January 12, 1905, that paragraph 5 of rule 14 be amended so as to read as follows:]**

5. All appeals, writs of error and citations must be made returnable and the transcript filed in the clerk's office at New Orleans not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.

Provided, however, that appeals taken from interlocutory decrees under the seventh section of the act entitled "An act to establish Circuit Courts of Appeals and define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," approved March 3, 1891, and amendments thereto, shall be made returnable not exceeding ten days from the day of taking the same.

6. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in general admiralty rule No. 52 of the supreme court.

## 15.

**[As originally adopted. See page xxix.]**

## 16.

**[This rule was amended April 23, 1895, by adding to it section 4 below. It was further amended June 20, 1895, by striking out of paragraph 1 the words in brackets. The whole rule now reads as follows:]**

### DOCKETING CASES.

1. It shall be the duty of the plaintiff in error or appellant to docket the case, and file the record thereof with the clerk of this court, by

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or before the return-day, whether in vacation or in term-time. But, for good cause shown, [the justice or judge who signed the citation, or] any judge of this court, may enlarge the time by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed, upon producing a certificate, whether in term-time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case, and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of this court.

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and, if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument at the term.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

4. In all cases the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking to the clerk, with surety to his satisfaction for the payment of his fees, or otherwise satisfy him in that behalf.

## 17.

[As originally adopted. See page xxx.]

See additional rule 35, page lxxxiv.

## 18.

[As originally adopted. See page xxx.]

## 19.

[As originally adopted. See page xxx.]

## 20.

[As originally adopted. See page xxxi.]

## 21.

[As originally adopted. See page xxxii.]

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## 22.

[As originally adopted. See page xxxii.]

## 23.

[Ordered, January 12, 1905, that paragraph 1 of rule 23 be amended so as to read as follows:]

### PRINTING RECORDS.

1. The clerk shall, upon the docketing of a case, forthwith cause an estimate to be made of the cost of printing the record and of his fee for preparing it for the printer and supervising the printing, and shall notify the party docketing the case of the amount of the estimate. If he shall not pay it within fifteen days in ordinary cases, and within three days in preference cases, after the date of such notice, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed when a case is reached for hearing, the case may be dismissed at the discretion of the court.

[Paragraphs 2–4, inclusive, as amended May 11, 1897.]

2. The clerk shall cause the record in all cases to be printed forthwith after the payment of such estimate, and shall immediately thereafter furnish to the counsel of each party whose appearance shall have been entered, three copies of the printed record, taking a receipt therefor, and the parties may, by written stipulation filed prior to the printing of the record, agree that only parts of the record shall be printed, and the same may be heard only on the parts so printed, but the court may direct the printing of other parts of the record.

3. The clerk shall not take to the printer the original transcript on file, but shall cause copies to be made for the printer of such original papers sent up under rule 14, or other original papers, as are necessary to be printed.

4. The clerk shall cause at least twenty-five copies of the record to be printed, and may print a larger number on the request of either party on payment of the amount necessary for the printing of such extra copies.

[Ordered, December 8, 1905, that paragraph 5 of rule 23 be amended so as to read as follows:]

5. The clerk shall supervise the printing and see that the printed record is properly indexed. There shall be omitted from the printed transcripts the following:

(1) Commissions to take testimony, and the formal captions to all depositions and the certificates of commissioners as to the taking of the depositions, except in cases where objections have been made to the depositions on account of defects in caption or certificate.

(2) All process in the nature of subpœnas, citations, summons and subpœnas in chancery, unless from the assignment of errors it appears that some issue is raised which makes it necessary for the court to inspect such writs, and then only such as are involved.



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In every transcript wherein any pleading, exhibit or other paper appears at more than one place, such pleading, exhibit or other paper shall be printed at the place it first appears in said transcript and not thereafter; but the omission shall be indicated by apt notations and references to the pages of the printed record where it appears.

The clerk shall distribute the printed copies to the judges of the court and to the reporter from time to time, as required. If the cost of printing the record, together with the clerk's fee for supervising the same, shall be less than the amount estimated and paid, the difference shall be refunded by the clerk to the party paying the same. If the actual cost and the clerk's fee shall exceed the clerk's estimate, the amount of such excess shall be paid to the clerk before he shall deliver or file the printed record or any copies thereof.

[Paragraphs 6 and 7 as amended May 11, 1897.]

6. In case of reversal, affirmance or dismissal with costs, the amount of the costs of the printing of the record and of the clerk's fee for supervising the same shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

7. The clerk shall receive from either party, and use as parts of the printed record so far as the same may be of proper size and type, any portions which may have been printed in any other court, and also printed copies of patents and exhibits, allowing the party furnishing the same such sum therefor as the clerk deems reasonable, to be added to and form a part of the costs of printing.

## 24.

[Ordered, January 12, 1905, that paragraph 1 of rule 24 be amended so as to read as follows:]

### BRIEFS.

1. The counsel for the plaintiff in error, appellant or petitioner shall file with the clerk of this court, at least fifteen days in ordinary cases, and in five days in preference cases, before the case is called for argument, twenty copies of a printed brief, one to be signed in handwriting by an attorney of this court, who has entered an appearance in the case. One copy of the brief shall, on application, be furnished to each of the counsel engaged upon the opposite side.

[Paragraph 2 stands as originally adopted. See page xxxiii.]

[Ordered that paragraph 3 of rule 24 be amended so as to read as follows:]

3. The counsel for defendant in error, appellee or respondent shall file with the clerk of this court, at least five days before the case is called for argument in ordinary cases, and before the case is called for argument in preference cases, twenty copies of a printed brief. His brief shall be of a like character with that required of the plaintiff in error, appellant or petitioner, except that no specification of errors shall be required and no statement of the case, unless that presented by the plaintiff in error, appellant or petitioner is controverted.

[Paragraphs 4, 5, and 6 stand as originally adopted. See page xxxiii.]

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## 25.

[This rule was amended February 27, 1894, so as to read as follows:]

### ORAL ARGUMENTS.

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. One hour will be allowed for the plaintiff in error or appellant to open and present his case, and one hour will be allowed to the defendant in error or appellee to answer; thirty minutes will then be allowed to the plaintiff in error or appellant to reply. No more time will be allowed for argument without special leave of the court.

## 26.

### FORM OF PRINTED ARGUMENTS AND BRIEFS.

All arguments, briefs, motions and petitions for rehearing printed for the use of the court must be printed on white book paper, size of paper page, trimmed, to be 6¼x9¼ inches; size of type page to be 4x7 inches, exclusive of folio line; margin to be properly arranged with view of rebinding. Type must not be smaller than long primer.

[As amended May 29, 1900.]

## 27.

[As originally adopted. See page xxxiv.]

## 28.

[As originally adopted. See page xxxiv.]

## 29.

[Ordered, January 12, 1905, that rule 29 be amended so as to read as follows:]

### REHEARING.

A petition for a rehearing after judgment can be presented only during the term at which judgment is entered, and within twenty days after such entry, unless by special leave granted by the court, or one of the judges, and must be printed and briefly and distinctly state its grounds without argument, and be supported by certificate of counsel; and will not be granted or permitted to be argued, unless a judge who concurred in the judgment desires it, and a majority of the court so determines.

## 30.

[As originally adopted. See page xxxv.]

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## 31.

[As originally adopted. See, also, order of the supreme court establishing a table of fees for the circuit courts of appeals, page cxxxix.]

## 32.

[Ordered, January 12, 1905, that rule 32 be amended so as to read as follows:]

### MANDATE.

Mandates shall issue at any time after twenty-one days from the date of the decision, unless an application for a rehearing has been granted or is pending. A copy of the opinion of this court shall accompany the mandate when a new trial or further proceedings are to be had in the lower court, and the charge for such copy shall be taxed in the costs of the case.

Provided, that in all cases entitled to precedence in this court under section 7 of the act approved March 3, 1891, and amendments thereto, the mandate or other proper process shall issue after the expiration of seven days from the date of the decision, unless otherwise ordered by the court or one of the judges.

## 33.

[As originally adopted. See page xxxvi.]

## 34.

[As originally adopted. See page xxxvi.]

## 35.

[Ordered, January 12, 1905, that rule 35, adopted June 23, 1892, be amended so as to read as follows:]

### ORDER IN RELATION TO ASSIGNMENT OF CASES FOR HEARING.

Unless otherwise ordered by the senior circuit judge, thirty days prior to the opening of a regular session of this court the clerk is directed to assign cases for hearing as follows:

At Atlanta, Georgia, four cases per day for the first three days of each week;

At Montgomery, Alabama, four cases per day for the first three days of each week;

At Ft. Worth, Texas, four cases per day for the first three days of each week;

At New Orleans, Louisiana, two cases per day for the first three days of each week.

The above assignments shall be made in accordance with existing law regulating the return of appeals, writs of error and other appellate proceedings in the Fifth judicial circuit, provided that cases entitled by law to preference in hearing and bankruptcy cases shall be first

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assigned, and cases whether preference or not may, upon stipulation of the parties filed with the clerk, be assigned for hearing at any other place or session of this court designated in such stipulation.

Except as hereinabove provided, the assignment of cases at New Orleans, Louisiana, shall be grouped by states, so as to permit the hearing of cases from one state before the cases from the next state in order shall be called.

## 36.

[The following rule was adopted June 23, 1892:]

### ASSIGNMENT OF JUDGES.

It is ordered that, whenever a full bench of three judges shall not be made up by the attendance of the associate justice of the supreme court assigned to the circuit and of the circuit judges, so many of the district judges in the order of the seniority of their respective commissions, and qualified to sit, as may be necessary to make up a full court of three judges, are hereby designated and assigned to sit in this court: provided, however, that the court may at any time, by particular assignment, designate any district judge to sit as aforesaid.

## 37.

[The following rule was adopted June 11, 1897:]

### WRITS OF ERROR IN CRIMINAL CASES.

1. Writs of error to review criminal cases tried in any district or circuit court of the United States within this circuit, which may be reviewed under the provisions of the act of March 3, 1891, creating this court, and the act of congress amendatory thereof, approved January 20, 1897, may be allowed in term time or in vacation by the circuit justice assigned to this circuit, by either of the circuit judges, or by any district judge who presided on the trial, and the proper security be taken, and the citation be signed by him, and he may also grant a supersedeas and stay of execution or proceedings pending the determination of such writ of error.

2. Where such writ of error is allowed in any criminal case as aforesaid, the circuit court or district court, before which the accused was tried, or the trial judge, or the circuit justice assigned to the circuit, or either of the circuit judges, shall have the power, after the citation has been duly served, to admit the accused to bail in such amount as may be fixed, such bail bond to be, as near as may be, in the form prescribed in the appendix to these rules.

### APPENDIX TO RULE 37.

[Form of Appearance Bond on Writ of Error in Criminal Cases.]

Know all men by these presents:

That we, ———, as principal, and ———, as sureties, are held and firmly bound unto the United States of America in the full and just sum of ——— dollars, to be paid to the said United States of America, to which payment

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well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this ——— day of ———, in the year of our Lord one thousand eight hundred and ninety ———.

Whereas, lately at the ——— term, A. D. 189—, of the ——— court of the United States for the ——— district of ———, in a suit pending in said court between the United States of America, plaintiff, and ———, defendant, a judgment and sentence was rendered against the said ———, and the said ——— has obtained a writ of error from the United States circuit court of appeals for the Fifth circuit, to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States circuit court of appeals for the Fifth circuit, at the city of New Orleans, Louisiana, thirty days from and after the date of said citation, which citation has been duly served.

Now, the condition of the above obligation is such that if the said ——— shall appear in the United States circuit court of appeals for the Fifth circuit on the first day of the next term thereof, to be held at the city of ———, on the first Monday in ———, A. D. 189—, and from day to day thereafter during said term, and from term to term, and from time to time, until finally discharged therefrom, and shall abide by and obey all orders made by the said United States circuit court of appeals for the Fifth circuit in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence of the said ——— court against him shall be affirmed by the said United States circuit court of appeals for the Fifth circuit, then the above obligation to be void; else to remain in full force, virtue, and effect.

——————— [Seal.]
——————— [Seal.]
——————— [Seal.]

Approved:

———————,
Judge of the ———.

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# SIXTH CIRCUIT.

[The rules as originally adopted, where identical with those of the other circuits, will be found at pages xxv–xxxvi. Only such originally adopted rules as were not identical with those of the other circuits, and amendments, changes, and repeals of the rules as originally adopted, are given under this head, reference being made to the others in their proper places.]

## 1.

[As originally adopted. See page xxv.]

## 2.

[As originally adopted. See page xxv.]

## 3.

[This rule, as originally adopted, appears in 11 C. C. A., page lxv, with amendments made before the preparation of that volume. See 47 Fed. iv, and 59 Fed. iv. It was further amended October 8, 1894 (see 67 Fed. viii, 14 C. C. A. iv), April 2, 1895 (see 66 Fed. v, 12 C. C. A. iv), February 10, 1896 (see 76 Fed. iii) and December 2, 1902. The rule, after these several amendments, reads as follows:]

### TERMS, HEARING AND CONTINUING OF CASES.

1. One term of this court shall be held annually on the Tuesday after the first Monday of October, and adjourned sessions on the Tuesday after the first Monday of each other month in the year except August and September. At the July session no causes will be heard, except upon special order of the court.

A printed docket containing all cases docketed and not heard shall be made by the clerk for the October, January and April sessions.

2. All sessions of the court shall be held at Cincinnati unless otherwise specially ordered by the court.

3. The court, on the first day of each session, except the July session, will begin calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the session in the same way.

4. If the parties, or either of them, shall be ready when the case is called, the same will be heard, provided that the time within which to file briefs has expired.

But a case may be continued once by agreement of counsel in open court or by stipulation filed in the clerk's office to any session during the term. Subsequent continuances must be made by the court on motion for cause shown; and engagements of counsel in other courts will not be considered good cause for continuance.

5. Each day's calendar shall consist of the six cases next in order after the case last submitted on the previous day, but the calendar will not include any case continued or passed by the court or stipulation of

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counsel before the adjournment of court on the previous day. The calendar for each day shall be exhibited in the clerk's office at the adjournment of court on the previous day. Counsel choosing to rely on the judgment of the clerk as to the probable time of hearing of any case, otherwise than as shown in the day's calendar above provided for, must do so at their own risk.

6. Two or more cases involving the same question may by leave of the court or by its order be heard together, but they must be argued as one case.

7. For good cause shown, on motion of either party, the court may advance any cause upon the docket to be heard at any session, even though the time permitted under the rules for the filing of briefs may not have expired at the day set for hearing. Such motion for the advancement of causes will be heard only upon five days' previous notice to opposing counsel.

[Promulgated December 2, 1902.]

## 4.

[As originally adopted. See page xxv.]

## 5.

[As originally adopted. See page xxvi.]

## 6.

[This rule was amended October 22, 1894, so as to read as follows:]

### MARSHAL, CRIER, AND OTHER OFFICERS.

1. The crier and bailiffs of the court shall, before they enter on their duties, take an oath in the form prescribed by section 782 of the Revised Statutes.

2. The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may, from time to time, order.

## 7.

[This rule, as originally adopted, appears in 47 Fed. v, and 11 C. C. A. lxvi. It was amended October 2, 1894, and further amended November 21, 1898, so as to read as follows:]

### ATTORNEYS AND COUNSELORS.

All attorneys and counselors permitted to practice in the supreme court of the United States, or in any circuit court of the United States, shall become attorneys and counselors in this court on taking an oath or affirmation as prescribed by rule 2 of the supreme court of the United States and upon subscribing the roll. The fee for such admission shall be ten dollars.

Every person taking the oath and paying such fee shall be entitled to a certificate of his admission, signed by the clerk.

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8.

[As originally adopted. See page xxvii.]

9.

[As originally adopted. See page xxvii.]

10.

[As originally adopted. See page xxvii.]

11.

[As originally adopted. See page xxvii.]

12.

[As originally adopted. See page xxviii.]

13.

[As originally adopted. See page xxviii.]

14.

[As originally adopted. See page xxviii.]

15.

[As originally adopted. See page xxix.]

16.

[Paragraph 1 of rule 16 was amended November 21, 1898, so as to read as follows:]

DOCKETING CASES.

1. It shall be the duty of plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time, and at the time of filing the record the plaintiff in error or appellant shall deposit with the clerk the sum of thirty-five dollars as security for costs. But for good cause shown, the justice or judge who signed the citation, or any judge of this court, may enlarge the time by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed, upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the said judgment or decree was rendered, stating the case and certifying that such writ of

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error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record, after the same shall have been docketed and dismissed under this rule, unless by order of the court.

[As originally adopted.]

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and, if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument at the term.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

## 17.

[This rule was amended October 22, 1894, and also on November 21, 1898, so as now to read as follows:]

### DOCKET.

The clerk shall enter upon a docket all cases brought to and pending in the court in their proper chronological order, and such docket shall be called at every calendar session, as provided in rules 3 and 37. And if a case is called for hearing at two calendar sessions successively, and upon the call at the second session neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

## 18.

[As originally adopted. See page xxx.]

## 19.

[As originally adopted. See page xxx.]

## 20.

[As originally adopted. See page xxxi.]

## 21.

[As originally adopted. See page xxxii.]

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## 22.

[The portion of the rule in brackets was added by amendment, June 22, 1893. Otherwise the rule reads as originally adopted.]

### PARTIES NOT READY.

1. Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial the defendant may have the plaintiff called, and the writ of error or appeal dismissed.

2. Where the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the case.

3. When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff.

[4. All causes shall stand for hearing when the time allowed for printing the records and the briefs of both parties shall have expired: provided, however, that causes may be heard when the records and briefs therein are printed, though the time allowed for printing records and briefs may not have expired.]

## 23.

[As amended. Paragraph 8 of the amendment adopted October 8, 1894, establishing the clerk's fees for preparing records, is repealed by the order of the supreme court establishing a table of fees for the circuit courts of appeals. See page cxxxix. The rule now reads as follows:]

### PRINTING RECORDS.

1. The clerk shall supervise the printing of all records, and upon the docketing of a case shall forthwith cause an estimate to be made of the cost of printing the record and his fee for preparing it for the printer and for supervising the printing thereof, and shall at once notify the attorney for the plaintiff in error, or appellant of the amount of such estimate, which shall be paid to the clerk within ten days after such notice. If not so paid the writ of error, or appeal, may be dismissed upon the motion of the opposite party or by the court of its own motion.

2. After the payment to him of such estimate the clerk shall cause at least twenty-five (25) copies of the record to be printed forthwith, shall file the same and shall furnish to each of the respective parties three (3) copies thereof, and take a receipt therefor.

3. Parties may agree by written stipulation filed with or prior to the filing of the record that parts only of the record shall be printed, and the case may be heard on the parts so printed; but the court may direct the printing of other parts of the record.

The plaintiff in error or appellant may, within 10 days after the case shall be docketed in this court, file with the clerk a statement of

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the parts of the record which he thinks necessary for the consideration thereof, and forthwith serve on the adverse party a copy of such statement. The adverse party, within 15 days after service of such statement, may designate in writing, filed with the clerk, additional parts of the record which he thinks material, and if he shall not do so he shall be held to have consented to the hearing of the parts designated by the plaintiff in error or appellant.

If parts of the record shall be so designated by one or both parties, the clerk shall print those parts only, and the court will consider nothing but those parts of the record.

If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed or such other order made as the circumstances may appear to the court to require.

If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made which the court shall think proper.

If good cause be shown the time within which the statement of the parts of the record is to be filed with the clerk by either party, as above limited, may be enlarged by the court in session or by either circuit judge if eligible to sit in the cause.

4. If the cost of printing and supervision shall be less than the amount estimated and paid, the clerk shall refund the difference to the party paying the same. If the cost is greater than the estimate the amount of such excess shall be paid to the clerk before he shall file the printed record or deliver any copies thereof.

5. In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing and supervision shall be taxed against the party against whom the costs are given, and shall be inserted in the mandate or other proper process.

[Paragraph 6 of rule 23 was amended November 21, 1898, so as to read as follows:]

6. In any case where the record shall have been printed in the court below, either circuit judge may, on the written application of the plaintiff in error or appellant, order that such printed record be used in this court. In such case the judge shall require, as a condition of making the order, a certificate of the clerk of this court that the record is in accordance with the printing rules and is properly indexed, in which case the supervision fee provided in table of costs, rule 31, shall be charged and collected by the clerk.

7. The clerk of this court shall receive proposals for printing, which shall be submitted to the senior circuit judge, who may in his discretion award such printing to the lowest and best bidder, and all such printing shall be done by the person to whom the same is so awarded. And when a case shall be heard upon a record printed in the court below the cost for printing shall be taxed on the basis of such bid for printing, except when the parties otherwise agree.

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## 24.

[This rule, with amendments down to the time of preparing 11 C. C. A. for the press, appears on page lxix thereof. See 66 Fed. vi. It was further amended February 25, 1895, so as to read as follows:]

### BRIEFS.

1. The counsel for the plaintiff in error shall file with the clerk of this court within twenty-five days after the filing of the printed copies of the record, as required in rule 23 as amended, twenty copies of a printed brief, one of which shall on application be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in order here stated:

(1) A concise abstract, or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised.

(2) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief, within forty days after the filing of the printed record, as required by rule 23. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no statement of the case shall be required, unless that presented by the plaintiff in error or appellant is controverted.

4. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default he will not be heard, except on consent of his adversary, and by request of the court.

5. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

## 25.

[As originally adopted. See page xxxiv.]

## 26.

[This rule was amended January 16, 1892, so as to read as follows: "Form of printed records, arguments, and briefs. All records, arguments, and briefs printed for the use of this court shall be in small pica type, twenty-four pica ems to a line, thirty-five lines to a page, leaded with four-to-pica leads, with an index and a suitable cover containing the title of the court and cause, the court from which the case is brought into this court, and the number of the case. Size of pages to be 9¼x6¼ inches, except that in patent cases the size of the pages shall be 10¾x7⅝ inches; that is to say, large enough to bind in copies of patent-office drawings and specifications without folding. Records

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printed in the courts below may be filed and used in this court if they conform to this rule." It was again amended January 2, 1894, so as to read as follows:]

FORM OF PRINTED RECORDS, ARGUMENTS, AND BRIEFS.

1. All records shall be of a uniform size, printed in small pica type, 24 pica ems to a line, 48 lines to a page, solid, with an index, and a suitable cover containing the title of the court and cause, the court from which the case is brought to this court, and the number of the case; size of pages to be 9¼x6¼ inches, except that in patent cases the size of the pages shall be 10¾x7⅝ inches; that is to say, large enough to bind in copies of patent-office drawings and specifications without folding.

2. All arguments and briefs of attorneys shall be printed, and conform as near as practicable to the size of the printed record.

## 27.

[As originally adopted. See page xxxiv.]

## 28.

[This rule as originally adopted appears in 11 C. C. A. lxxi, 47 Fed. xii. It was further amended October 22, 1894, so as to read as below. Paragraph 4 of the amendment, establishing the clerk's fees for opinions of the court, has been repealed by the order of the supreme court establishing a table of fees for the circuit courts of appeals, see page cxxxix.]

OPINIONS OF THE COURT.

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded.

2. The opinions of the court shall be printed under the supervision of the clerk by the printer to whom the court printing has been awarded in accordance with paragraph 7, rule 23.

3. Opinions printed under the supervision of the clerk need not be copied into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

## 29.

REHEARINGS.

A petition for rehearing after judgment can be presented only within thirty days after the day when the printed opinion of the court is returned by the printer to the clerk, and can be obtained by counsel for the parties, (which date the clerk shall note upon the appearance docket), unless by special leave granted during such thirty days; and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted or permitted to be argued unless a judge who concurred in the judgment desires it, and a majority of the court so determines.

[Amendment adopted June 22, 1893.]

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## 30.

### INTEREST.

1. In cases where a writ of error is prosecuted in this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the state where such judgment was rendered.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent. in addition to interest shall be awarded upon the amount of the judgment.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

4. In cases in admiralty damages and interest may be allowed, if specially directed by the court.

## 31.

### COSTS.

1. In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

2. In all cases of affirmance of any judgment or decree in this court costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

3. In cases of reversal of any judgment or decree in this court costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be taxable in that court as costs in the case.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

5. When costs are allowed in this court it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

6. In all cases certified to the supreme court or removed thereto by certiorari or otherwise the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the supreme court.

### TABLE OF COSTS.

Ordered, in pursuance of the act of Congress of February 19, 1897 (29 Stat. 536, c. 263), that the following table of fees and costs in the Circuit Courts of Appeals be, and the same is hereby, established, to take effect on the first day of March, A. D. 1898, and no other fees and costs than those therein named shall thereafter be charged:*

* See page cxxxix.

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## 32.

[This rule as amended June 22, 1893, appears in 11 C. C. A. lxxi, 66 Fed. vii. It was further amended October 2, 1894, so as to read as follows:]

### MANDATE.

In all cases finally determined in this court, a mandate or other proper process in the nature of a procedendo shall be issued, on the order of this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

Such mandate shall not issue until time has elapsed for filing a petition to rehear as defined by rule 29; and no mandate or other process of procedendo shall issue when a petition to rehear is pending, unless specially ordered.

Every mandate shall be accompanied by a copy of the opinion filed in the cause in which it is issued, and the charge for the same shall be taxed in the costs of the case.

## 33.

[As originally adopted. See page xxxvi.]

## 34.

[As originally adopted. See page xxxvi.]

## 35.

[This additional rule was adopted June 22, 1893:]

### TESTIMONY IN ADMIRALTY CASES AFTER APPEAL.

In admiralty appeals no testimony shall be taken except under a commission issued from this court to a clerk of a United States court or a United States commissioner, by direction of the court, the circuit justice, or either circuit judge, qualified to sit on appeal in said case, after cause shown to such court, justice, or judge that such evidence is material and necessary, and could not by due diligence have been produced at the original hearing. Such testimony shall be taken only upon interrogatories settled by such court, justice, or judge, upon at least ten days' previous notice to the opposing party or his attorney (accompanied with a copy of the proposed interrogatories), and upon cross interrogatories to be settled at the same time after five days' previous notice of the same, with copy thereof, to be served upon counsel offering testimony.

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## 36.

[This additional rule was promulgated October 2, 1894:]

### DISPOSITION OF FEES NOT COSTS IN CASES.

All fees collected by the clerk which are not properly taxable as costs in any case pending in the court and which are not by law required to be deposited by him in the treasury of the United States, after the payment of any deficit arising from the printing of opinions, shall constitute a fund to be expended in the purchase of law books for the library of the court by the clerk, under the direction of the court. And it shall be the duty of the clerk to render to the court for its examination and approval a quarterly account of such fees received and disbursed by him.

## 37.

[Adopted March 21, 1897.]

### APPEAL OR WRIT OF ERROR MAY BE ALLOWED.

1. An appeal or writ of error from a circuit court or a district court to this court in the cases provided for in sections 6 and 7 of the act entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," approved March 3, 1891, and acts to amend said act approved February 18, 1895, and January 20, 1897, may be allowed in term time or vacation by the circuit justice or by either circuit judge within the circuit or by any district judge within his district and the proper security be taken and the citation be signed by him, and he may also grant a supersedeas and stay of execution or of proceedings, pending such writ of error or appeal.

2. Where such writ of error to this court is allowed in the case of a conviction of an infamous crime or in any other criminal case in which it will lie, the circuit court or district court, or any justice or judge thereof, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed.

[Promulgated March 21, 1897.]



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## SEVENTH CIRCUIT.

[The rules as originally adopted, where identical with those of the other circuits, will be found at pages xxv–xxxvi. Only such originally adopted rules as were not identical with those of the other circuits, and amendments, changes, and repeals of the rules as originally adopted, are given under this head, reference being made to others in their proper places.]

### 1.

[As originally adopted. See page xxv.]

### 2.

[As originally adopted. See page xxv.]

### 3.

[This rule as originally adopted read as follows: "Terms. A term of this court shall be held annually at the city of Chicago on the first Monday in October, and continue until the first Monday in October of the succeeding year. Each term shall be adjourned to such times and places as the court may from time to time designate. The first regular term shall commence on the first Monday in October, 1891." It was amended, so as to read as follows:]

TERMS.

A term of this court shall be held annually at the city of Chicago on the first Tuesday in October, and continue until the first Tuesday in October of the succeeding year. Every term shall be adjourned to such times and places as the court may from time to time designate. Unless otherwise specially ordered, the court will hold at Chicago three sessions for the hearing of causes during each term, beginning on the first Tuesdays in October, January and May, respectively.

### 4.

QUORUM.

1. If, at any term or session, a quorum does not attend on any day appointed for holding it, any judge who does attend may adjourn the court from time to time, or, in the absence of any judge, the clerk may adjourn the court from day to day. If, during a term or session, after a quorum has assembled, less than that number attend on any day, any judge attending may adjourn the court from day to day until there is a quorum or may adjourn without a day.

2. Any judge attending when less than a quorum is present may make all necessary orders touching any suit, proceeding, or process depending in or returned to the court preparatory to hearing, trial or decision thereof.

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## 5.

### CLERK.

1. The clerk's office shall be kept at Chicago.

2. The clerk shall not practice either as attorney or counselor, in this court or in any other court.

3. He shall, before he enters on the execution of his office, take an oath in the form prescribed by section 794 of the Revised Statutes, and shall give bond in a sum to be fixed and with sureties to be approved by the court, faithfully to discharge the duties of his office and seasonably to record the decrees, judgments and determinations of the court. A copy of such bond shall be entered on the journal of the court, and the bond shall be deposited for safe-keeping as the court shall direct.

4. He shall not permit any original record or paper to be taken from the court room or from the office without an order from the court.

5. All fees collected by the clerk which are not properly taxable as costs in any case and which are not by law required to be by him deposited in the treasury of the United States, shall constitute a fund to be expended by the clerk under the direction of the court in the purchase of law books for the library of the court.

6. The clerk shall keep an accurate and itemized account of all moneys received by him officially, including costs and fees in cases in the court and fees and moneys collected on any account whatever, and shall deposit the same as received daily to his credit as clerk and separately from all individual accounts in a national bank designated by the senior judge; and at the end of each month and whenever required by the court or senior judge shall submit to the senior judge a detailed report showing by items all moneys received and all paid out during the month and the total balances on hand from each and all sources of receipt. Each report shall be accompanied by a statement over the signature of the cashier or other officer of the bank in which the deposit is kept of the amount in the bank to the credit of the clerk at the close of the last day included in the report.

## 6.

### MARSHAL, CRIER, AND OTHER OFFICERS.

1. The crier and bailiffs of the court, before entering upon their duties, shall take an oath in the form prescribed by section 782 of the Revised Statutes.

2. The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may from time to time order.

## 7.

### ATTORNEYS AND COUNSELORS.

All attorneys and counselors, admitted to practice in the supreme court of the United States or in any circuit court of the United States,

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or in the supreme court of a state in this circuit, may become attorneys and counselors in this court on taking an oath or affirmation in the form prescribed by rule 2 of the supreme court of the United States (3 Sup. Ct. v.), and on subscribing the roll.

## 8.

[As originally adopted. See page xxvii.]

## 9.

[As originally adopted. See page xxvii.]

## 10.

### BILL OF EXCEPTIONS AND TRANSCRIPT.

1. The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, and upon any general exception to the whole of said charge. But the party excepting shall be required to state distinctly the several matters of law in the charge to which he excepts, and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

2. A bill of exceptions shall contain of the evidence only such a statement as is necessary for the presentation and decision of questions saved for review, and unless there be saved a question which requires the consideration of all the evidence, a bill of exceptions containing all the evidence shall not be allowed.

3. No document shall be copied more than once in a bill of exceptions or in a transcript of the record of the case, but instead there shall be inserted a reference to the one copy set out. A motion for a new trial and orders and entries relating thereto shall not be set out in the transcript unless required by written precipe, of which a copy shall also be set out.

4. The cost of unnecessary matter in the bill of exceptions or transcript or in the printed record shall not be recovered of the appellee or defendant in error, and in its discretion the court will in case of dispute appoint a referee to determine and report what was necessary therein; and will tax the cost of the reference as shall seem just.

## 11.

### ASSIGNMENT OF ERRORS.

The plaintiff in error, or appellant, shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors which shall specify separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evi-

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dence, the specification of the error shall quote the full substance of the evidence admitted or rejected. When the evidence rejected is oral testimony a written statement of the substance of what the witness was expected to testify shall be filed and brought to the attention of the court before the retirement of the jury. When the error alleged is to the charge of the court, each specification of error shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused, and shall state distinctly the grounds of objection to an instruction given. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done counsel will not be heard, except at the request of the court, and errors not assigned according to this rule will be disregarded, but the court at its option may notice a plain error not assigned. (See rule 24, post).

## 12.

[As originally adopted. See page xxviii.]

## 13.

[As originally adopted. See page xxviii.]

## 14.

### WRITS OF ERROR, APPEALS, RETURN AND RECORD.

1. The clerk of the court, to which any writ of error may be directed, shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case (necessary to the hearing in this court), under his hand and the seal of the court. The clerk may require of the appellant or plaintiff in error a written precipe stating in detail what the transcript shall contain, and when a precipe is filed shall insert a copy thereof in the transcript.

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

3. No case will be heard until a complete record shall have been filed, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings necessary to the hearing in this court.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit or district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting and return of such original papers as to him may seem proper, and this court will receive and consider such original papers in connection with the transcript of the proceeding.

5. All appeals, writs of error and citations must be made returnable not exceeding thirty days from the date on which the appeal is allowed,

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or the writ of error issued, whether the return fall in vacation or in term time, and be served before the return day. If a party be non-resident the citation and any other writ or notice necessary in the prosecution of the appeal or writ of error may be served upon such party's counsel or attorney of record, who for such purpose may not bs discharged unless another resident be designated of record in the case upon whom service may be made.

6. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in general admiralty rule No. 52 of the supreme court.

## 15.

[As originally adopted. See page xxix.]

## 16.

[As originally adopted. See page xxix.]

## 17.

### DOCKET.

The clerk shall prepare calendars of causes for the regular terms of this court, to be held on the first Tuesday of October in each year, and for each adjourned session; placing thereon in proper chronological order only cases in which, the record having been printed, briefs upon both sides have been filed seven days before the beginning of the term or session.

## 18.

[As originally adopted. See page xxx.]

## 19.

[As originally adopted. See page xxx.]

## 20.

### DISMISSING CASES.

Whenever the parties to a writ of error or an appeal shall, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, in respect to costs, and shall pay to the clerk any fees that may be due to him, the clerk shall enter the case dismissed, and shall give to either party requesting it a copy of the agreement filed, but no mandate or other process shall issue without an order of the court.

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## 21.

### MOTIONS.

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and the object of the motion.

2. One-half hour on each side shall be allowed for the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

## 22.

### PARTIES NOT READY.

1. Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial the other party may have the writ of error or appeal dismissed.

2. If the appellee or defendant in error fails to appear when the case is called, the court may proceed to hear argument on the part of the plaintiff in error or appellant and to give judgment according to the right of the case.

3. When a case is reached in the regular call of the docket, and there is no appearance for either party, and no brief on file for the appellant or plaintiff in error, the case shall be dismissed at the cost of the appellant or plaintiff in error.

## 23.

### PRINTING THE RECORD.

1. In all cases the plaintiff in error or appellant on docketing a case and filing the record shall enter into an undertaking to the clerk with surety to be approved by the clerk for the payment of all costs which shall be incurred in the cause, shall deposit with the clerk twenty-five dollars to be applied to the payment of costs and fees, and from time to time when necessary shall, on the demand of the clerk, make further deposits for that use.

2. The clerk, upon the docketing of a case, shall forthwith cause an estimate to be made of the cost of printing the record and of his fees for preparing it for the printer and for supervising the printing thereof, and shall at once notify the attorney for the plaintiff in error, or appellant, of the amount of such estimate, which shall be paid to the clerk within ten days after such notice. If not so paid, the writ of error or appeal may be dismissed upon the motion of the opposite party, or by the court of its own motion.

3. The clerk shall cause the record in each case to be printed forthwith after the payment of such estimate, and shall immediately thereafter furnish to each of the respective parties at least three copies

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of the printed record, taking a receipt therefor. The parties may, by written stipulation filed with or prior to the filing of the record, agree that only parts of the record shall be printed, and the case will be heard on the parts so printed only, unless the court shall direct the printing of other parts.

4. The clerk shall cause at least twenty-five copies of the record to be printed and may print a larger number on the request of either party on payment of the amount necessary for the printing of such extra copies.

5. The clerk shall supervise the printing and see that the printed record is indexed properly, and in a manner to indicate briefly the character of each document and exhibit referred to. He shall distribute the printed copies to the judges of the court from time to time as required. If the cost of printing the record, together with the clerk's fee for supervising the same, shall be less than the amount estimated and paid, the difference shall be refunded by the clerk to the party paying the same. If the actual cost and the clerk's fee shall exceed the estimate, the amount of the excess shall be paid to the clerk before he shall deliver or file the printed record or copies thereof.

6. In case of reversal, affirmance or dismissal with costs, the amount of the cost of the printing of the record and of the clerk's fee for supervising the same, shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

7. Upon the clerk's producing satisfactory evidence by affidavit, or by the acknowledgment of the parties or their sureties or attorneys, of having served a copy of the bill of fees due from them respectively in this court on such parties, their sureties or attorneys, an attachment shall issue against such parties or their sureties respectively, to compel the payment of said fees.

8. The clerk shall adopt a uniform size for the printing of all records, shall have them printed in small pica type, on clear white paper, with a margin of not less than an inch and a half, shall show by note or memorandum on the margin the time when each pleading or document was filed, and at the top of the pages shall insert running titles of their contents.

9. The briefs of attorneys shall be printed, and shall conform as nearly as practicable to the size of the printed record.

10. The clerk shall, on or before the conclusion of each case, collect and file or otherwise preserve together one copy of the printed record and of each brief, printed motion and argument submitted therein.

11. In any case where the record shall have been printed in the court below, in substantial conformity to these rules, the presiding judge may on the application of the plaintiff in error or appellant order that such printed record be used in place of the printing hereinbefore provided for. But the clerk shall prepare and cause to be printed and attached to such record an index, and shall be paid the same fees for the indexing and supervising thereof as if printed under his supervision.

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12. The clerk of this court shall obtain sealed proposals for the printing hereinbefore provided for, which proposals shall be submitted to the senior circuit judge of the court, who may award such printing to the lowest and best bidder, and all such printing shall be done by the person to whom the same is so awarded, except in emergencies when printing may be done by another at the same or less price. And when a case shall be heard upon the record printed below, the costs for printing shall be taxed on the basis of actual cost not exceeding the rate of the accepted bid.

13. The fees of the clerk of this court, as prescribed by order of the supreme court, made February 28, 1898, are as follows:[10]

## 24.

### BRIEFS.

1. The counsel for the plaintiff in error or appellant shall file with the clerk of this court, within twenty days after the date of the delivery by the clerk of the printed record, twenty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in the order here stated, and under the respective titles, "Statement of Case," "Errors Relied Upon," and "Brief of Argument:"

(1) A concise abstract, or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised.

(2) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged, and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in an instruction given or in one refused. When the error alleged is to a ruling upon the report of a master the specification shall state the exception to the report and the action of the court upon it. Following each specification there shall be a reference by page to the portion of the printed record on which the question arises.

(3) A brief of the argument exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for the defendant in error or the appellee shall file with the clerk twenty printed copies of his brief within twenty days after the filing of the brief of the plaintiff in error or appellant. His brief shall conform to the requirements of this rule except that no

[10] See page cxxxix.

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specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted. Either party, at or before the argument of the cause, may file a supplemental brief strictly confined to matter in reply to the brief of the opposite party.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court, and errors not specified according to this rule, and rule 11, ante, will be disregarded; but the court at its option may notice a plain error involving the merits of the case, though not assigned or specified, and though the question be not saved according to the strict rules of practice, if it be apparent of record that the point was contested and not waived in the court below.

5. When, according to this rule, a plaintiff in error or appellant is in default, the case may be dismissed on motion, and when a defendant in error or appellee is in default, he will not be heard except on consent of his adversary, or by request of the court.

6. When no counsel appears for one of the parties, and no printed brief or argument has been filed, only one counsel will be heard for the adverse party, but if a printed brief or argument has been filed, the adverse party will be entitled to be heard by two counsel.

## 25.

### ORAL ARGUMENTS.

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But, when there are cross-appeals, they shall be argued together as one case; and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. Two hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side, at their discretion: provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

[Paragraph 4 adopted May 24, 1893.]

4. Reading at length from briefs or reported cases shall not be indulged.

## 26.

### OPINIONS OF THE COURT.

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

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3. Opinions printed under the supervision of the judge delivering the same need not be copied by the clerk into a book of records, but, at the end of each term, the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

## 27.

### REHEARING.

A petition for rehearing must be filed within thirty days after entry of judgment or decree, or after filing of the opinion, shall be in print, and be served forthwith by copy upon the opposing party, who, within twenty days from such service, may file a printed answer, and the petition shall be determined without oral arguments, unless otherwise ordered. If a petition be not filed within the time allowed, and upon the overruling of a petition, the clerk shall, without special order, issue the mandate of the court to the court below. Twenty copies of such petition or answer shall be filed with the clerk of this court.

## 28.

### INTEREST.

1. When a judgment for the payment of money is affirmed by this court, the interest thereon shall be calculated and levied from the date of the judgment below until the same is paid, and at the same rate that similar judgments bear interest in the courts of the state where such judgment was rendered.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent., in addition to interest, shall be awarded on the amount of the judgment.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

4. In cases in admiralty, damages and interest may be allowed, if specially directed by the court.

## 29.

### COSTS.

1. When any suit shall be dismissed in this court, except for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

2. In every case of a judgment or decree affirmed in this court costs shall be allowed to the defendant in error or appellee unless otherwise ordered by the court.

3. In every case of reversal of a judgment or decree in this court costs shall be allowed to the plaintiff in error or appellant unless otherwise ordered by the court. The costs of the transcript of the record

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from the court below shall be taxable in that court as costs in the case.

4. No costs shall be allowed in this court for or against the United States.

5. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and to annex to the same the bill of items taxed in detail.

6. In all cases certified to the supreme court or removed thereto by certiorari or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the supreme court.

## 30.

### MANDATE.

In all cases finally determined in this court, a mandate or other proper process in the nature of a procedendo shall be issued, on the order or by the rule of this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

## 31.

### CUSTODY OF PRISONERS ON HABEAS CORPUS.

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in the custody of the court or judge, or be enlarged upon recognizance, as hereinafter provided.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court except where, for special reasons, sureties ought not to be required.

## 32.

### MODELS, DIAGRAMS AND EXHIBITS.

Models, diagrams and exhibits of material forming part of the evidence taken in the court below, and in any case pending in this court on writ of error or appeal, shall be placed in the custody of the marshal for the use of this court at least ten days before the case is heard or submitted; and shall be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule, and, if the articles are not removed within a reasonable time after the notice is given, he shall destroy or make such other disposition of them as to him may seem best.

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## 33.

### LAW LIBRARY.

1. The library of the court shall be under the general supervision and custody of the clerk of the court.

2. No book shall be removed from the library except by or upon the written order of a federal judge or the United States district attorney for his own use in Chicago, except that during the sessions of the court any lawyer who has a case upon the docket, upon written application to the clerk and upon the clerk's written order, may take from the library not exceeding three volumes at a time, being responsible for the return thereof within twenty-four hours, and in default of return shall pay to the clerk for the library fund twice the value thereof, but if returned in good condition one dollar for each day's detention beyond the limited time.

3. Members of the bar of the court may have access to the library at any time during business hours.

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## EIGHTH CIRCUIT.

[The rules as originally adopted, where identical with those of the other circuits, will be found at pages xxv–xxxvi. Only such originally adopted rules as were not identical with those of the other circuits, and amendments, changes, and repeals of the rules as originally adopted, are given under this head, reference being made to the others in their proper places.]

### 1.

[As originally adopted. See page xxv.]

### 2.

[As originally adopted. See page xxv.]

### 3.

[This rule as originally adopted read as follows: "Terms. One term of this court shall be held annually at the city of St. Louis on the second Monday of October, and shall be adjourned to such times and places as the court may from time to time designate." As now amended it reads as follows:]

In accordance with the provisions of the act of Congress, approved June 9, 1902, requiring the circuit court of appeals of the Eighth judicial circuit to hold a term of court annually in the city of St. Paul and in the city of Denver or in the city of Cheyenne, ordered, that rule 3 of this court be and the same is hereby amended so as to read as follows:

Three terms of this court will be held annually, one at the city of St. Paul on the first Monday of May, one at the city of Denver on the first Monday of September and one at the city of St. Louis on the first Monday of December.

Cases from Minnesota, North Dakota, South Dakota, Nebraska, Iowa, Kansas, Missouri, Arkansas, Oklahoma and the Indian Territory in which transcripts are filed on or before the 1st day of April, and cases from Colorado, Utah, Wyoming and New Mexico in which transcripts and stipulations of the parties for their hearing at the May term in St. Paul are filed on or before the 1st day of April, and those only, will be heard at the succeeding May term of the court in St. Paul.

Cases from Colorado, Wyoming, Utah and New Mexico in which transcripts are filed on or before the 1st day of July, and cases from the remainder of the circuit in which transcripts and stipulations of the parties for their hearing at the September term in Denver are filed on or before the 1st day of July, and those only, will be heard at the succeeding September term in Denver.

Cases from Minnesota, North Dakota, South Dakota, Nebraska, Iowa, Kansas, Missouri, Arkansas, Oklahoma and the Indian Territory in which transcripts are filed on or before the 1st day of October, and cases from Colorado, Wyoming, Utah and New Mexico in which transcripts and stipulations of the parties for their hearing at

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the December term in St. Louis are filed on or before the 1st day of October, and those only, will be heard at the succeeding December term in St. Louis.

These terms of the court may be adjourned to such times and places as the court may from time to time designate.

[Promulgated June 16, 1902.]

4.

[As originally adopted. See page xxv.]

5.

[As originally adopted. See page xxvi.]

6.

[Amended by the omission of paragraph 1 as originally adopted.]

MARSHAL, CRIER, AND OTHER OFFICERS.

The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may, from time to time, order.

7.

[The first section of this rule reads as originally adopted. The second section was added by amendment June 27, 1892.]

ATTORNEYS AND COUNSELORS.

1. All attorneys and counselors admitted to practice in the supreme court of the United States, or in any circuit court of the United States, or in the supreme court of any state in this circuit may, upon motion of some member of the bar of this court, be admitted as attorneys and counselors in this court on taking an oath or affirmation in the form prescribed by rule 2 of the supreme court of the United States, and on subscribing the roll; but no fee shall be charged therefor.

2. And any attorney and counselor admitted to practice in the courts of highest original jurisdiction in the states and territories of this circuit or in the supreme courts of such states and territories, or in the district or circuit courts of the United States for this circuit, will be admitted to practice and enrolled as an attorney and counselor of this court, upon furnishing to the clerk of this court a certificate of a clerk or judge of any one of the courts named that the applicant is an attorney of any one of said courts; and upon subscribing and forwarding to the clerk the following oath: "I do solemnly swear (or affirm) that I will demean myself as an attorney and counselor of the circuit court of appeals for the Eighth circuit, uprightly and according to law; and that I will support the Constitution of the United States. So help me God."

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8.

[As originally adopted. See page xxvii.]

9.

[As originally adopted. See page xxvii.]

10.

[As originally adopted. See page xxvii.]

11.

[As originally adopted. See page xxvii.]

12.

[As originally adopted. See page xxviii.]

13.

[As originally adopted. See page xxviii.]

14.

[This rule, as originally adopted, was amended February 10, 1896, by adding to the second paragraph the words in brackets.]

WRITS OF ERROR, APPEALS, RETURN, AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case, [and in cases at law a complete copy of the charge of the court to the jury].

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court, shall be filed.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit or district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safekeeping, transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such

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original papers in connection with the transcript of the proceedings.

5. All appeals, writs of error, and citations must be made returnable not exceeding sixty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.

6. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in general admiralty rule No. 52 of the supreme court.

## 15.

[As originally adopted. See page xxix.]

## 16.[11]

[As originally adopted. See page xxix.]

## 17.

[As originally adopted. See page xxx.]

## 18.

### CERTIORARI.

No certiorari for diminution of the record will be awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such certiorari must be made at the first term of the entry of the case; otherwise the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

## 19.

[As originally adopted. See page xxx.]

## 20.

[As originally adopted. See page xxxi.]

## 21.

[As originally adopted. See page xxxii.]

[11] A deposit of $25 to secure clerk's costs is required before the record in a cause is filed and docketed.



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## 22.

[Amended by the insertion of the words "in error or appellant" in the third line of the first paragraph.]

### PARTIES NOT READY.

1. Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff in error or appellant called and the writ of error or appeal dismissed.

2. Where the defendant in error or appellee fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff in error or appellant, and to give judgment according to the right of the case.

3. When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff in error or appellant.

## 23.

### PRINTING RECORDS.

1. The plaintiff in error or appellant may, within twenty days after the allowance of any writ of error or appeal, serve on the adverse party a copy of a statement of the parts of the record which he thinks necessary for the consideration of the errors assigned, and file the same, with proof of service thereof, with the clerk of this court; the adverse party, within twenty days thereafter, may designate in writing and file with the clerk additional parts of the record which he thinks material, and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record in determining the questions raised by the errors assigned. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

2. On the filing of the transcript in every case the clerk shall cause the same, or the parts thereof designated under this rule, to be printed, and shall furnish three copies of the record so printed to each party at least sixty days before the argument.

3. In cases brought to this court in which the record has been printed and used upon the hearing in the court below, and which substantially conform to the printed records in this court, the plaintiff in error or appellant upon application to and by leave of this court, may furnish to the clerk twenty-five copies of such record, used on the hearing in the court below, to be used in the preparation of the printed record in this court; and the clerk's fee for preparing the record for the printer,

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indexing same, supervising the printing and distributing the copies, shall be computed as if said record so furnished had been printed under his supervision.

4. The clerk shall be entitled to demand of the plaintiff in error or appellant the cost of printing the record before ordering the same to be done.

5. If the record shall not have been printed when the case is reached for argument, for failure of the party to advance the costs of printing, the case may be dismissed.

6. In case of reversal, affirmance or dismissal with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given.

## 24.

**[This rule as originally adopted reads as follows:]**

### BRIEFS.

1. The counsel for the plaintiff in error or appellant shall file with the clerk of this court, at least forty days before the case is called for argument, twenty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in order here stated:

(1) A concise abstract or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised.

(2) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and, in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief, at least ten days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule

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will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default he will not be heard, except on consent of his adversary, and by request of the court.

6. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

## 25.

[As originally adopted. See page xxxiv.]

## 26.

### FORM OF PRINTED RECORDS, ARGUMENTS, AND BRIEFS.

All records, arguments and briefs for the use of the court must be printer on paper not less than 6⅛ inches wide by 9⅜ inches long, including margin, so that they can be conveniently bound together to make an ordinary octavo volume. Arguments and briefs not conforming to this rule will not be accepted or filed.

## 27.

[As originally adopted. See page xxxiv.]

## 28.

[As originally adopted. See page xxxiv.]

## 29.

### REHEARING.

1. A petition for rehearing after judgment, can be presented only at the term at which judgment is entered and before the issuance of a mandate to the court below, except in cases in which the judgment of this court is entered within thirty days prior to the final adjournment of the term, and in such cases a petition for rehearing may be filed at the succeeding term within thirty days after the date of the final adjournment of the term at which the judgment was entered.

2. Such petition for rehearing must be printed and twenty copies thereof filed with the clerk and must briefly and distinctly state its grounds, and be supported by a certificate of counsel, and will not be granted or permitted to be argued, unless a judge who concurred in the judgment desires it, and a majority of the court so determines.

## 30.

[As originally adopted. See page xxxv.]

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## 31.

[This rule as originally adopted reads as follows. See, also, order of the supreme court establishing a table of fees for the circuit courts of appeals, page cxxxix.]

### COSTS.

1. In all cases where any suit shall be dismissed in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be taxable in that court as costs in the case.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

5. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

6. In all cases certified to the supreme court or removed thereto by certiorari or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the supreme court.

## 32.

### MANDATE.

In all cases finally determined in this court, a mandate or other proper process in the nature of a procedendo shall be issued on the order of this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

[Note.—By an order entered February 20, 1893, the clerk is directed to issue a mandate or other proper process, to the court below, in all cases, 60 days after the final disposition thereof, excepting in cases dismissed under the provisions of rule 20, and section 1 of rule 16, and except in cases where it shall be otherwise expressly ordered.]

## 33.

[As originally adopted. See page xxxvi.]

## 34.

### MODELS, DIAGRAMS, AND EXHIBITS OF MATERIAL.

1. Models, diagrams and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court,

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on writ of error or appeal, shall be placed in the custody of the marshal of this court at least ten days before the case is heard or submitted.

2. All models, diagrams and exhibits of material placed in the custody of the marshal for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and, if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

## 35.

### WRITS OF ERROR IN CRIMINAL CASES.

1. Writs of error to review criminal cases tried in any district or circuit court of the United States within this circuit, which may be reviewed under the provisions of the act of March 3, 1891, creating this court, and the act of congress amendatory thereof, approved January 20, 1897—may be allowed in term time or in vacation by the circuit justice assigned to this circuit, or by either of the circuit judges within the circuit, or by any district judge within his district, and the proper security be taken, and the citation signed by him, and he may also grant a supersedeas and stay of execution or proceedings, pending the determination of such writ of error.

2. Where such writ of error is allowed in the criminal cases aforesaid, the circuit court or district court before which the accused was tried, or the district judge of the district wherein he was tried, within the district, or the circuit justice assigned to the circuit, or either of the circuit judges within the circuit, shall have the power, after the citation has been duly served, to admit the accused to bail in such amount as may be fixed, such bail bond to be, as near as may be, in the form prescribed in the appendix to these rules.

[Promulgated February 23, 1897.]

## 36.

### PETITIONS FOR REVIEW.

A petition for review under the provisions of section 24b of the bankruptcy law, approved July 1, 1898, shall be filed and docketed as an original action in this court, and be entitled "In re ———, Petitioner," and shall specifically designate the person or persons upon whom the petitioner desires notice to be served.

## 37.

### ORDER OF COURT.

1. Upon the filing of a petition for review, the same shall be presented to the court, or one of the circuit judges, for an order fixing the return day to the notice required by law.

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2. When such petition is accompanied by a written consent that the petition for review may be filed and a waiver by the defendant or defendants, or their counsel, of such notice, no notice will be issued. In such cases the case will be docketed by the clerk pursuant to rules forty and forty-two.

## 38.

### NOTICE.

The notice to be given, as provided by law, shall be issued by the clerk of this court, under the seal thereof, and shall be addressed to the defendant or defendants and be served by the marshal of this court, unless an acknowledgment or acceptance of service thereof is made by the defendant or defendants, or their counsel.

## 39.

### RESPONSE.

The response to the petition, when the defendant elects to make a written response, shall be filed at least fifteen days before the day set for the hearing.

## 40.

### PRINTING OF RECORD.

The clerk shall cause the petition and exhibits thereto, if any, and the order, notice and response, if any, to be printed, and shall distribute the printed copies of same to counsel for the respective parties, as soon as the same are printed.

## 41.

### BRIEFS AND ARGUMENTS.

Twenty copies of the brief and argument in behalf of petitioner shall be printed and filed ten days before the day set for the hearing and twenty copies of the brief and argument for the defendant or defendants shall be printed and filed on or before the day of hearing.

## 42.

### HEARING.

1. Petitions for review filed in vacation, shall be assigned by the clerk for hearing in their regular order at the next session or term of the court in the same manner as appeals and writs of error in other cases.

2. Petitions for review filed during a session of the court, when a sufficient showing of urgency is presented, may be set for hearing at that term and upon such terms and conditions as the court may direct.

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3. Petitions for review assigned by the clerk in their regular order as provided in section 1 of this rule, when such assignment is for a day near the close of the session, may be advanced by order of the court and set for an earlier day, upon good cause shown therefor by either of the parties.

## 43.

### COSTS.

1. The costs and fees now provided by law in cases upon appeal or writ of error, shall, so far as the same are applicable, be taxed on petitions for review.

2. Upon the determination of a petition for review such order as to costs will be made as the court may deem necessary.

## 44.

### PROCEDENDO.

1. In all cases on a petition for review wherein the action or judgment of the district court, complained of, is disapproved by this court, the clerk shall, at the expiration of ten days from and after the date of entering judgment in this court, issue process in the nature of a procedendo to the said district court for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such district court in conformity with the judgment of this court.

2. In all cases on petition for review, wherein the action or judgment of the district court, complained of, is approved or confirmed or said petition dismissed by this court the clerk shall forthwith certify that fact to the district court.

## 45.

### APPEALS AND WRITS OF ERROR IN BANKRUPTCY CASES.

1. The appeals and writs of error provided for by section 25 of the bankruptcy law, approved July 1, 1898, shall be governed by the same rules and regulations as to costs and procedure as are provided by this court for appeals and writs of error in other cases.

### ADDENDA.

[Form of Writ of Error for Use in the United States Circuit Court of Appeals, Eighth Circuit.]

United States of America, ss.

The President of the United States of America,

To the Honorable Judges of the (1).....

..... Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said.....Court, before

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you, at the.....Term, 19..., thereof, between (2).....
.....
a manifest error hath happened, to the great damage of the said (3)....
..... as by .....
complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, on or before the (4).....day of.....19..., to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this.....day of .....in the year of our Lord one thousand nine hundred.....

Issued at office in.....with the
seal of the (5).....
and dated as aforesaid.

.....
Clerk of.....

Allowed by
.....
.....Judge.

**[Form of Return to be Endorsed on Writ of Error by the Clerk of the Court to Which the Writ is Addressed.]**

United States of America, }
..... } ss.

In obedience to the command of the within Writ, I herewith transmit to the United States Circuit Court of Appeals, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name and affix the seal of (6).....

.....
Clerk of.....

**Notes.—(1) Here insert correct name of the court to which the writ is addressed and whose judgment is to be reviewed.**

**(2) Here insert correct style of cause showing who was plaintiff and who defendant in court below.**

**(3) Here insert name of party who sues out writ of error.**

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(4) Rule XIV, subdivision 5, requires writs of error and appeals to be made returnable sixty days after citation is signed.

This blank must be filled accordingly, naming a day not more than sixty days after the date of the citation.

(5) See section 1004, Rev. St. and section 11, Act March 3, 1891. This blank should be so filled as to show whether the writ is issued by the clerk of a United States Circuit Court or by the clerk of the Circuit Court of Appeals.

(6) Here describe the court to which the writ is addressed.

[Form of Citation.]

United States of America,

To..... Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to (1).....filed in the Clerk's Office of the (2).....wherein.....is (3)..... and you are (4)....., to show cause, if any there be, why the (5)..... rendered against the said (6).....as in said (7).....mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable (8)..... Judge of.....this.....day of .....A. D. 19....

.....

Judge of.....

Notes.—(1) Insert (a writ of error) or (an appeal allowed and).

(2) Insert name of court to which writ of error is addressed, or from which appeal is allowed.

(3) Insert plaintiff in error or appellant.

(4) Insert defendant in error or appellee.

(5) Insert judgment or decree.

(6) Insert plaintiff in error or appellant.

(7) Insert writ of error or appeal.

(8) As to whom may sign citation, see sections 998 and 999, Rev. St. U. S., and section 11, Act March 3, 1891, establishing Circuit Courts of Appeals.

[Form of Supersedeas or Cost Bond.]

Know All Men By These Presents,

That we,..... are held and firmly bound unto..... in the full and just sum of.....to be paid to the said.....heirs, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals, and dated this.....day of....., in the year of our Lord one thousand nine hundred.....

Whereas, lately at the.....term of the..... .....in a suit depending in said Court between....., plaintiff, and..... ....., defendant,.....was rendered against the said.....and the said..... .....has obtained.....

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of the said Court to reverse the.....in the aforesaid suit, and a citation directed to the said.....citing and admonishing.....to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said.. .....shall prosecute said..... .....to effect, and answer all damages and costs if .....fail to make good.....plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

.....[Seal.]
.....[Seal.]
.....[Seal.]

Approved by

.....

**[The foregoing bond and citation is adapted for appeals in equity cases as well as in cases of writs of error in actions at law.]**

**[Form of Appearance Bond on Writ of Error in Criminal Cases.]**

Know All Men By These Presents,

That we,..... as principal, and..... as sureties, are held and firmly bound unto the United States of America in the full and just sum of.....Dollars, to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this.....day of..... in the year of our Lord, One Thousand Nine Hundred.....

Whereas, lately at the.....Term, A. D. 190 , of the..... .....Court of the United States for the.....District of....., in a suit depending in said Court between the United States of America, plaintiff, and..... ..... defendant a judgment and sentence was rendered against the said..... .....and the said ..... ha obtained a writ of error from the United States Circuit Court of Appeals for the Eighth Circuit, to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said citation, which citation has been duly served.

Now the condition of the above obligation is such that if the said ..... ..... shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Eighth Circuit on such day or days as may be

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appointed for the hearing of said cause in said Court and prosecute his said writ of error and shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Eighth Circuit in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence against him shall be affirmed; and if he shall appear for trial in the.....Court of the United States for the.....District of..... on such day or days as may be appointed for a retrial by said..... .....Court and abide by and obey all orders made by said Court provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Eighth Circuit; then the above obligation to be void, otherwise to remain in full force, virtue and effect.

.....[Seal.]
.....[Seal.]
.....[Seal.]

Approved:

.....

Judge of the.....

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# NINTH CIRCUIT.

[The rules as originally adopted, where identical with those of the other circuits, will be found at pages xxv–xxxvi. Only such originally adopted rules as were not identical with those of the other circuits, and amendments, changes, and repeals of the rules as originally adopted, are given under this head, reference being made to the others in their proper places.]

## 1.

[As originally adopted. See page xxv.]

## 2.

[As originally adopted. See page xxv.]

## 3.

[This rule as originally adopted reads as follows:]

### TERMS.

One term of this court shall be held annually at the city of San Francisco on the first Monday of October, and shall be adjourned to such times and places as the court may from time to time designate.

## 4.

### QUORUM.

1. If at any term or session a quorum does not attend on any day appointed for holding it, any judge who does attend may adjourn the court from time to time, or, in the absence of any judge, the clerk may adjourn the court from day to day. If, during a term, after a quorum has assembled, less than that number attend on any day, any judge attending may adjourn the court from day to day until there is a quorum, or may adjourn without day.

2. Any judge attending when less than a quorum is present may make all necessary orders touching any suit, proceeding, or process, depending in or returned to the court, preparatory to hearing, trial, or decision thereof.

## 5.

### CLERK.

1. The clerk's office shall be kept at San Francisco, California.

2. The clerk shall not practice, either as attorney or counselor in this court or in any other court while he shall continue to be clerk of this court.

3. He shall, before he enters on the execution of his office, take an oath in the form prescribed by section 794 of the Revised Statutes, and

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shall give bond in a sum to be fixed, and with sureties to be approved, by the court, faithfully to discharge the duties of his office and seasonably to record the decrees, judgments, and determinations of the court. A copy of such bond shall be entered on the journal of the court, and the bond shall be deposited for safe keeping as the court may direct.

4. He shall not permit any original record or paper to be taken from the court-room or from the office, without an order from the court, except as provided in rule 23.

## 6.

### MARSHAL, CRIER, AND OTHER OFFICERS.

1. The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may, from time to time, order.

## 7.

[This rule as originally adopted reads as follows:]

### ATTORNEYS AND COUNSELORS.

All attorneys admitted to practice in the supreme court of the United States, or in any circuit court of the Ninth circuit, shall be deemed attorneys of the circuit court of appeals for the Ninth circuit; but such attorneys, on or before their first appearance in open court, in said court, shall take an oath or affirmation, in the form prescribed by rule 2 of the supreme court of the United States, and subscribe the roll of attorneys. All other persons who have been admitted to practice in the highest court of any state or territory, upon presenting satisfactory evidence of good moral character and fair professional standing, may be admitted to practice in said court, upon taking the oath so prescribed, and subscribing the roll of attorneys.

[Note.—Briefs signed by counsel who are not members of the bar of this court or fully qualified under the provisions of this rule will not be considered by the court.]

## 8.

[As originally adopted. See page xxvii.]

## 9.

[As originally adopted. See page xxvii.]

## 10.

[As originally adopted. See page xxvii.]

## 11.

[As originally adopted. See page xxvii.]

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## 12.

[As originally adopted. See page xxviii.]

## 13.

[As originally adopted. See page xxviii.]

## 14.

### WRITS OF ERROR, APPEALS, RETURN, AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, opinion or opinions of the court, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record the original writ of error and citation, or citation issued in the cause, and a certificate under seal stating the cost of the record and by whom paid.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court, shall be filed.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit or district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe keeping, transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

5. All appeals, writs of error, and citations must be made returnable at San Francisco, California, not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.

6. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in general admiralty rule No. 52 of the Supreme Court.

## 15.

[As originally adopted. See page xxix.]

## 16.

[Paragraph 1 of rule 16 was amended October 20, 1899, so as to read as follows:]

### DOCKETING CASES.

1. It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court at San

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Francisco, California, by or before the return day, whether in vacation or in term time. But for good cause shown, the justice or judge who signed the citation, or any judge of this court, may enlarge the time by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed, upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

2. But the defendant in error or appellee may, at his option, file a copy of the record and docket the case with the clerk of this court; and if a copy of the record is filed and the case docketed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument at the term.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of counsel for the party docketing the case shall be entered.

## 17.

**[Rule 17 was amended October 20, 1899, so as to read as follows:]**

### DOCKET.

The clerk shall, upon payment to him by the appellant or plaintiff in error of a deposit of twenty-five dollars in each case, file the record and enter upon a docket all cases brought to and pending in the court in their proper chronological order.

## 18.

**[As originally adopted. See page xxx.]**

## 19.

**[As originally adopted. See page xxx.]**

## 20.

### DISMISSING CASES BY AGREEMENT.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, as to costs, and shall pay to the clerk any fees that

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may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

## 21.[12]

### MOTIONS.

1. All motions to the court shall be reduced to writing, shall contain a brief statement of the facts and objects of the motion and shall be served upon opposing counsel at least five days before the day noticed for the hearing.

2. One-half hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice as above has been given to the adverse party, or the counsel or attorney of such party.

## 22.

### PARTIES NOT READY.

1. Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff called, and the writ of error or appeal dismissed.

2. When the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the case.

3. Where a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff in error or appellant.

## 23.

### PRINTING RECORDS.

1. All records shall be printed under the supervision of the clerk, and upon the docketing of a cause, he shall cause an estimate to be made of the expense of printing the record, and his fee for preparing it for the printer and supervising the printing, and shall notify the party docketing the case of the amount of the estimate. If the amount so estimated is not promptly paid over to the clerk and for want of such payment the record shall not have been printed when a case is reached for argument, the case shall be dismissed.

2. Upon payment of the amount estimated by the clerk, thirty copies of the record shall be printed, under his supervision, for the use of the court and of counsel.

[12] When typewritten, an original and three copies should be filed.



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3. In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers sent up under Rule 14, section 4, as are necessary to be printed; and the whole of the record in cases of original jurisdiction.

4. The clerk shall supervise the printing and see that the printed copy is properly indexed. He shall distribute the printed copies to the judges and the reporter, and one or more printed copies to the counsel for the respective parties.

5. If the expense of printing and supervision shall be less than the amount estimated and paid, the clerk shall refund the difference to the party paying same. If the expense is greater than the estimate the amount of such excess shall be paid to the clerk before he shall file the printed record or deliver copies to the parties or their counsel.

6. In case of reversal, affirmance or dismissal, with costs, the amount paid for printing the record and of the clerk's fee shall be taxed against the party against whom costs are given.

7. The plaintiff in error or appellant may, upon filing the record in this court, file with the clerk a statement of the errors on which he intends to rely, and of the parts of the record which he thinks necessary for the consideration thereof, and forthwith serve on the adverse party a copy of such statement. The adverse party within ten days thereafter, may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, or if such parts be distinctly designated by stipulation of counsel for the respective parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record, and the errors so stated. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

All statements and stipulations filed hereunder shall distinctly and accurately refer to the pages of the original certified record, as well as the documents to be printed or omitted.

8. At the time of filing the record and docketing the cause, counsel for the plaintiff in error or appellant in patent cases may furnish the clerk with copies of patent office drawings and specifications to be used as inserts, and the same, if in proper form and of convenient size, shall be used in printing the record [without cost to the parties. (As amended March 2, 1900.)]

9. The fee of the clerk for preparing the record for the printer, indexing the same, supervising the printing, and distributing the copies, for each printed page of the record and index, twenty-five cents.[13]

[13] See order of the supreme court establishing a table of fees for the circuit courts of appeals, page cxxxix.

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## 24.

### BRIEFS.

1. The counsel for the plaintiff in error or appellant shall file with the clerk of this court, twenty copies of a printed brief, and serve upon counsel for the defendant in error or the appellee one copy thereof, at least ten days before the case is called for argument.

2. This brief shall contain, in order here stated:

(a) A concise abstract or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised.

(b) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is as to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(c) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief and serve upon counsel for plaintiff in error or appellant one copy thereof, at least three days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of error shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and, when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

6. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but, if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

[*Note.*—Briefs signed by counsel who are not members of the bar of this court or fully qualified under the provisions of rule 7, will not be considered by the court. See, also, subdivision 2 of rule 26.]

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## 25.

### ORAL ARGUMENTS.

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. One hour on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion: provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

## 26.

### FORM OF PRINTED RECORDS, ARGUMENTS, BRIEFS AND PETITIONS FOR REHEARING.

1. All records printed for the use of the court must be printed on unruled white writing paper, nine and one-quarter inches long and six and one-quarter inches wide. The printed page exclusive of any marginal note, reference or running head, must be seven inches long and four inches wide, excepting in patent cases where counsel furnish to the clerk at the time of docketing the cause patent office drawings and specifications for insertion. In such cases the margin of the record may be sufficiently enlarged to accommodate such drawings and specifications. The record must be properly indexed. Pica double-leaded is the only mode of composition allowed.

2. All arguments, briefs, and petitions for rehearing, printed for the use of the court, must be printed on unruled white writing paper, nine and one-quarter inches long and six and one-quarter inches wide. The printed page, exclusive of any marginal note, reference or running head, must be seven inches long and four inches wide. Pica double-leaded is the only mode of composition allowed.

## 27.

[As originally adopted. See page xxxiv.]

## 28.

[Rule 28 was amended March 2, 1900, so as to read as follows:]

### OPINIONS OF THE COURT.

The original opinions of the court shall be filed with the clerk of this court for preservation, and when so filed the same shall be deemed to have been recorded within the meaning of this rule.

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## 29.

### REHEARING.

A petition for rehearing may be presented within 30 days after judgment. It must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel that in his judgment it is well founded, and that it is not interposed for delay. Twenty printed copies must be filed with the clerk of this court.

## 30.

[As originally adopted. See page xxxv.]

## 31.

### COSTS.

1. In all cases where any suit shall be dismissed in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, including the cost of the transcript from the court below, unless otherwise ordered by the court.

4. Neither of the foregoing sections shall apply to cases where the United States are a party, but in such cases no costs shall be allowed in this court for or against the United States.

5. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

6. In all cases certified to the supreme court or removed thereto by certiorari or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the supreme court.

7. Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of any bill of fees due by them, respectively, in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties respectively to compel payment of said fees.[14]

[14] See order of the supreme court establishing a table of fees for the circuit courts of appeals, page cxxxix.

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## 32.

### MANDATE.

In all cases finally determined in this court, a mandate or other proper process in the nature of a procedendo shall, upon the payment of any costs due in the case, be issued, as of course from this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain. Such mandate, if not stayed by the order of the court, shall be issued on the expiration of thirty days from the date of such final determination unless within said time a petition for rehearing be filed, in which case the mandate shall be stayed until five days after the determination of such petition.

## 33.

[As originally adopted. See page xxxvi.]

## 34.

[As originally adopted. See page xxxvi.]

## 35.

### ASSIGNMENT OF CAUSES FOR HEARING.

1. Thirty days prior to the opening of any calendar session of the court, the clerk is directed to assign causes for hearing at the rate of one case for the first day of each term or session, and two cases per day for each of the ensuing court days of such term or session. Causes shall be grouped by states, and assignments made, so as to permit the hearing of causes from one state before the causes from the next state in order shall be called; causes from the Northern district of California shall be assigned for hearing last. Any causes entitled by law to preference in hearing shall be first assigned and take precedence over other causes from the same state.

2. A stipulation to continue a case to the foot of the calendar or in any way change the day assigned for hearing, will not be recognized as binding upon the court, and no such change will be made except by order of the court for reason shown.

3. Ten days before each calendar session of the court the clerk shall prepare and cause to be printed a calendar of the causes assigned for the approaching session.

## 36.

### TERMS AND SESSIONS OF THE COURT.

1. One term of this court shall be held annually on the first Monday of October and adjourned sessions on the first Monday of each month in the year. All sessions shall be held at San Francisco unless otherwise especially ordered by the court.

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2. The October, February and May sessions shall be known as calendar sessions, and shall be sessions for the trial of all causes that shall have been placed upon the calendar in pursuance of Rule 35.

[Paragraph 3 of rule 36 was amended October 20, 1899, so as to read as follows:]

3. A term of this court shall be held annually in the city of Seattle in the state of Washington and in the city of Portland in the state of Oregon. The Seattle term shall be held beginning upon the second Monday in September, and the term at Portland shall be held beginning upon the third Monday in September. All appeals and writs of error from the circuit and district courts for the district of Washington, the transcripts of which shall be filed in this court between the first day of April and the first day of August of each year, shall be heard at said annual term in the city of Seattle, unless it be stipulated by the parties thereto that they be heard at San Francisco. All other appeals and writs of error from said circuit and district courts for that district shall be heard at San Francisco, unless it be stipulated by the parties thereto that they be heard at said annual term in the city of Seattle. All appeals and writs of error from the circuit and district courts for the district of Oregon, the transcripts of which shall be filed in this court between the first day of April and the first day of August of each year, shall be heard at said annual term in the city of Portland, unless it be stipulated by the parties thereto that they be heard at San Francisco. All other appeals and writs of error from said circuit and district courts for that district shall be heard at San Francisco, unless it be stipulated by the parties thereto that they be heard at said annual term in the city of Portland. Appeals and writs of error from the circuit and district courts for the districts of Idaho and Montana, and from the district courts of Alaska may, upon the stipulation of the parties thereto, be heard at the annual term to be held either at Seattle or Portland.

### 37.

### PHOTOGRAPH OF CHINESE TO BE ATTACHED TO BAIL BOND.

Whenever, in cases of deportation of Chinese, the defendant be admitted to bail pending appeal, before the bond be approved and the party released from custody a photograph of the defendant shall be attached to said bond.

## RULES IN ADMIRALTY.

[Adopted May 21, 1900.]

### 1.

### APPEALS AND NEW PLEADINGS.

An appeal to the circuit court of appeals shall be taken by filing in the office of the clerk of the district court, and serving on the proctor of the adverse party, a notice signed by the appellant or his proctor

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that the party appeals to the circuit court of appeals from the decree complained of.

The appeal shall be heard on the pleadings and evidence in the district court, unless the appellate court, on motion, otherwise order.

[Note.—This rule so far modifies rule 11 of the general rules (see page xxvii) that a petition for an appeal and the allowance thereof is not required in an admiralty case, nor is the assignment of errors required to be filed with notice of appeal. The assignment of errors must, however, be sent up to the appellate court with the apostles, as required in rule 4 of the admiralty rules.]

## 2.

### NOTICE AND BOND.

Section 1. When a notice of appeal is served, the appellant shall file in the clerk's office of the district court a bond for costs of the appeal, with sufficient surety, in the sum of $250, conditioned that the appellant shall prosecute his appeal to effect and pay the costs, if the appeal is not sustained. Such security shall be given within ten days after filing the notice, or the appeal shall be deemed abandoned, and the decree of the court below enforced, unless otherwise ordered by a judge of this court.

Sec. 2. And if the appellant desires to stay the execution of the decree of the court below, the bond which he shall give shall be a bond with sufficient surety in such further sum as the judge of the district court or a judge of this court shall order, conditioned that he will abide by and perform whatever decree may be rendered by this court in the cause, or on the mandate of this court by the court below.

Sec. 3. The appellant shall, on filing either of such bonds, give notice of such filing, and of the names and residences of the sureties, and if the appellee, within two days, excepts to the sureties, they shall justify, on notice, within two days after such exception.

## 3.

### REVIEW IN PART ONLY.

The appellant may also, at his option, state in his notice of appeal that he desires only to review one or more questions involved in the cause, which questions must be clearly and succinctly stated; and he shall be concluded in this behalf by such notice, and the review upon such an appeal shall be limited to such question or questions.

## 4.

### APOSTLES ON APPEAL TO CONTAIN.

Section 1. The apostles, on an appeal to this court, shall, in cases where a general notice of appeal is served, consist of the following:

(1) A caption exhibiting the proper style of the court and the title of the cause, and a statement showing the time of the commencement of the suit; the names of the parties, setting forth the original parties and those who have become parties before the appeal, if any change has taken place; the several dates when the respective pleadings were

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filed; whether or not the defendant was arrested, or bail taken, or property attached, or arrested, and if so, an account of the proceedings thereunder; the time when the trial was had, and the name of the judge hearing the same; whether or not any question was referred to a commissioner, or commissioners, and if so, the result of the proceedings and report thereon; the date of the entry of the interlocutory and final decrees; and the date when the notice of appeal was filed.

(2) All the pleadings, with the exhibits annexed thereto.

(3) All the testimony and other proofs adduced in the cause.

(4) The interlocutory decree and any order of the court which appellant may desire to have reviewed on the appeal.

(5) Any report of a commissioner or commissioners to which exception may have been taken, with the order or orders of the court respecting the same, and the exceptions to the report, and so much of the testimony taken in the proceeding as may be necessary to a review of the exceptions.

(6) All opinions of the court, whether upon interlocutory questions or finally deciding the cause.

(7) The final decree, and the notice of appeal; and

(8) The assignments of error.

Sec. 2. All other papers shall be omitted unless otherwise ordered by the judge who heard the cause.

Sec. 3. Where the appellant shall appeal specially and seek only to review one or more questions involved in the cause, the apostles may, by stipulation between the proctors for the respective parties, contain only such papers and proceedings and evidence as are necessary to review the questions raised by the appeal.

## 5.

### CERTIFYING RECORDS.

The appellants shall, within thirty days after giving notice of appeal, procure to be filed in this court the apostles certified by the clerk of the district court, or in case of a special appeal, the stipulated record, with the certification by the said clerk of all papers contained therein on file in his office.

## 6.

### IF APPEARANCE OF APPELLEE NOT ENTERED.

If the appellee does not cause his appearance to be entered in this court within ten days after service on his proctor of notice that the apostles are filed in this court, the appellant may proceed ex parte in the cause, and have such decree as the nature of the case may demand.

## 7.

### NEW ALLEGATIONS, ETC.

Upon sufficient cause shown, this court or any judge thereof, may allow either appellant or appellee to make new allegations or pray dif-

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ferent relief, or interpose a new defense, or make new proofs. Application for such leave may be made at any time after the perfecting of the appeal to this court, and within fifteen days after the filing in this court of the apostles, and upon at least four days' notice to the adverse party or his attorney of record.

## 8.

### NEW PLEADINGS—NEW TESTIMONY.

If leave be granted to make new allegations, pray different relief or interpose a new defense, the moving party shall, within ten days thereafter, serve such new pleading, duly verified, on the adverse party, who shall, if such pleading be a libel, within twenty days answer on oath.

If leave be given to take new testimony, the same may be taken and filed within thirty days after the entry of the order granting such leave, and the adverse party may take and file counter-testimony within twenty days after such filing.

## 9.

### NEW TESTIMONY—HOW TAKEN.

Such testimony shall be taken by deposition before the clerk of this court, or any United States commissioner, or any clerk of a district or circuit court of the United States, or any notary public, upon reasonable notice, in writing, given to the opposite party or his attorney of record, either in this court or in the court below, which notice must state the name or names of the witness or witnesses and the time and place of taking his or their deposition or depositions; or by commission issued out of this court with interrogatories annexed. Upon sufficient cause shown, the court may grant an open commission.

## 10.

### PRINTING NEW PLEADINGS AND TESTIMONY.

If new pleadings are filed or testimony taken in this court, the same shall also be printed and furnished by the clerk, as in the 23d general rule provided.

## 11.

### MOTIONS.

All motions shall be made upon at least four days' notice.

## 12.

### EXTENSION OF TIME.

The time specified in the foregoing rules for any proceeding may be extended by order of a judge of this court.

These rules shall go into effect on the first Monday of October, 1900.

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# ORDER OF SUPREME COURT.

## TABLE OF FEES.

Ordered, that the table of fees and costs in the circuit courts of appeals, established in pursuance of the act of congress of February 19, 1897, by order of January 10, 1898, be, and the same is hereby, amended as to the item for "Preparing the record for the printer, indexing the same, supervising the printing and distributing the copies, for each printed page of the record and index, .15," by substituting twenty-five cents in place of fifteen cents, for each printed page, so that said order as amended shall read as follows:

Ordered, in pursuance of the act of congress of February 19, 1897 (29 Stat. 536, c. 263), that the following table of fees and costs in the circuit courts of appeals be, and the same is hereby, established, to take effect on the first day of March, A. D. 1898, and no other fees and costs than those therein named shall thereafter be charged:

| | |
|---|---|
| Docketing a case and filing the record | $ 5 00 |
| Entering an appearance | 25 |
| Transferring a case to the printed calendar | 1 00 |
| Entering a continuance | 25 |
| Filing a motion, order, or other paper | 25 |
| Entering any rule, or making or copying any record or other paper, for each one hundred words | 20 |
| Entering a judgment or decree | 1 00 |
| Every search of the records of the court and certifying the same | 1 00 |
| Affixing a certificate and a seal to any paper | 1 00 |
| Receiving, keeping, and paying money, in pursuance of any statute or order of court, one per cent. on the amount so received, kept and paid. | |
| Preparing the record for the printer, indexing the same, supervising the printing and distributing the copies, for each printed page of the record and index | 25 |
| Making a manuscript copy of the record, when required by the rules, for each one hundred words (but nothing in addition for supervising the printing) | 20 |
| Issuing a writ of error and accompanying papers, or a mandate or other process | 5 00 |
| Filing briefs, for each party appearing | 5 00 |
| Copy of an opinion of the court, certified under seal, for each printed page (but not to exceed five dollars in the whole for any copy) | 1 00 |
| Attorney's docket fee | 20 00 |

I, James M. McKenney, clerk of the supreme court of the United States, do hereby certify that the foregoing is a true copy of the order of said supreme court entered on February 28, 1898, in pursuance of the act of congress of February 19, 1897, as the same remains upon the files and records of said supreme court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said supreme court, at the city of Washington, this 11th day of March, A. D. 1898.

[Seal.] JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.



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# OFFICE OF THE CLERK,
# SUPREME COURT OF THE UNITED STATES
## WASHINGTON, D. C.

---

**INSTRUCTIONS AS TO APPLICATIONS FOR WRITS OF CERTIORARI UNDER ACT OF MARCH 3, 1891.**

The following are the requirements on applications for writs of certiorari under the act of March 3, 1891:

Petitions are docketed in this court as

————, Petitioner, v. ————, Respondent.

Before the petition will be docketed there must be furnished this office:

1. An original petition, with written signature of counsel.
2. A certified copy of the transcript of the record, including all proceedings in the Circuit Court of Appeals.
3. An appearance of counsel for petitioner, signed by a member of the bar of this court.
4. A deposit of $25 on account of costs.

Before submission of the petition there must be furnished:

1. Proof of service of notice of date fixed for submission and of copies of petition and brief upon counsel for the respondent. About two weeks' notice should be given.
2. Twenty-five printed copies of the petition.
3. Twenty-five printed copies of brief in support of petition, if any such brief is to be filed.
4. At least nine uncertified copies of record, which must contain all the proceedings in the Circuit Court of Appeals. These copies may be made up by using copies of the record as printed for the Circuit Court of Appeals and adding thereto printed copies of the proceedings in that court. If a sufficient number of records thus made up cannot be obtained, making it necessary to reprint the record for use on the hearing of the petition, fifty copies must be printed under my supervision, in order that, should the petition be granted, there may be a sufficient number for use on the final hearing.

Monday being motion day, some Monday must be fixed upon for the submission of the petition. No oral argument is permitted on such petitions, but they must be called up and submitted in open court by counsel for petitioner, or by some attorney in his behalf.

*All papers in the case must be filed not later than the Saturday preceding the Monday fixed for the submission of the Petition.*

JAMES H. McKENNEY,
Clerk of the Supreme Court of United States.



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# JUDGES

OF THE

# UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

## FIRST CIRCUIT.

Hon. OLIVER WENDELL HOLMES, Circuit Justice.....Washington, D. C.
Hon. LE BARON B. COLT, Circuit Judge.....Providence, R. I.
Hon. WILLIAM L. PUTNAM, Circuit Judge.....Portland, Me.
Hon. FRANCIS C. LOWELL, Circuit Judge.....Boston, Mass.
Hon. CLARENCE HALE, District Judge, Maine.....Portland, Me.
Hon. FREDERIC DODGE, District Judge, Massachusetts.....Boston, Mass.
Hon. EDGAR ALDRICH, District Judge, New Hampshire.....Littleton, N. H.
Hon. ARTHUR L. BROWN, District Judge, Rhode Island.....Providence, R. I.

## SECOND CIRCUIT.

Hon. RUFUS W. PECKHAM, Circuit Justice.....Washington, D. C.
Hon. WILLIAM J. WALLACE, Circuit Judge.....Albany, N. Y.
Hon. E. HENRY LACOMBE, Circuit Judge.....New York, N. Y.
Hon. WILLIAM K. TOWNSEND, Circuit Judge.....New Haven, Conn.
Hon. ALFRED C. COXE, Circuit Judge.....Utica, N. Y.
Hon. JAMES P. PLATT, District Judge, Connecticut.....Hartford, Conn.
Hon. EDWARD B. THOMAS, District Judge, E. D. New York [1].....Brooklyn, N. Y.
Hon. THOMAS I. CHATFIELD, District Judge, E. D. New York [2].....Brooklyn, N. Y.
Hon. GEORGE W. RAY, District Judge, N. D. New York.....Norwich, N. Y.
Hon. GEORGE B. ADAMS, District Judge, S. D. New York.....New York, N. Y.
Hon. GEORGE C. HOLT, District Judge, S. D. New York.....New York, N. Y.
Hon. CHARLES M. HOUGH, District Judge, S. D. New York.....New York, N. Y.
Hon. JOHN R. HAZEL, District Judge, W. D. New York.....Buffalo, N. Y.
Hon. JAMES L. MARTIN, District Judge, Vermont.....Brattleboro, Vt.

## THIRD CIRCUIT.

Hon. WILLIAM H. MOODY, Circuit Justice.....Washington, D. C.
Hon. GEORGE M. DALLAS, Circuit Judge.....Philadelphia, Pa.
Hon. GEORGE GRAY, Circuit Judge.....Wilmington, Del.
Hon. JOSEPH BUFFINGTON, Circuit Judge.....Pittsburgh, Pa.
Hon. EDWARD G. BRADFORD, District Judge, Delaware.....Wilmington, Del.
Hon. WILLIAM M. LANNING, District Judge, New Jersey.....Trenton, N. J.

[1] Resigned January 1, 1907.

[2] Appointed to succeed Edward B. Thomas.



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Hon. JOSEPH CROSS, District Judge, New Jersey.....Elizabeth, N. J.
Hon. JOHN B. McPHERSON, District Judge, E. D. Pennsylvania.....Philadelphia, Pa.
Hon. JAMES B. HOLLAND, District Judge, E. D. Pennsylvania.....Philadelphia, Pa.
Hon. ROBERT WODROW ARCHBALD, District Judge, M. D. Pennsylvania..Scranton, Pa.
Hon. NATHANIEL EWING, District Judge, W. D. Pennsylvania.....Pittsburgh, Pa.

## FOURTH CIRCUIT.

Hon. MELVILLE W. FULLER, Circuit Justice.....Washington, D. C.
Hon. NATHAN GOFF, Circuit Judge.....Clarksburg, W. Va.
Hon. JETER C. PRITCHARD, Circuit Judge.....Asheville, N. C.
Hon. THOMAS J. MORRIS, District Judge, Maryland.....Baltimore, Md.
Hon. THOMAS R. PURNELL, District Judge, E. D. North Carolina.....Raleigh, N. C.
Hon. JAMES E. BOYD, District Judge, W. D. North Carolina.....Greensboro, N. C.
Hon. WILLIAM H. BRAWLEY, District Judge, E. and W. D. South Car..Charleston, S. C.
Hon. EDMUND WADDILL, Jr., District Judge, E. D. Virginia.....Richmond, Va.
Hon. HENRY CLAY McDOWELL, District Judge, W. D. Virginia.....Lynchburg, Va.
Hon. ALSTON G. DAYTON, District Judge, N. D. West Virginia.....Philippi, W. Va.
Hon. BENJAMIN F. KELLER, District Judge, S. D. West Virginia.....Bramwell, W. Va.

## FIFTH CIRCUIT.

Hon. EDWARD D. WHITE, Circuit Justice.....Washington, D. C.
Hon. DON A. PARDEE, Circuit Judge.....Atlanta, Ga.
Hon. A. P. McCORMICK, Circuit Judge.....Dallas, Tex.
Hon. DAVID D. SHELBY, Circuit Judge.....Huntsville, Ala.
Hon. THOMAS GOODE JONES, District Judge, M. and N. D. Alabama...Montgomery, Ala.
Hon. HARRY T. TOULMIN, District Judge, S. D. Alabama.....Mobile, Ala.
Hon. CHARLES SWAYNE, District Judge, N. D. Florida.....Pensacola, Fla.
Hon. JAMES W. LOCKE, District Judge, S. D. Florida.....Jacksonville, Fla.
Hon. WILLIAM T. NEWMAN, District Judge, N. D. Georgia.....Atlanta, Ga.
Hon. EMORY SPEER, District Judge, S. D. Georgia.....Macon, Ga.
Hon. CHARLES PARLANGE, District Judge, E. D. Louisiana [3].....New Orleans, La.
Hon. EUGENE D. SAUNDERS, District Judge, E. D. Louisiana [4].....New Orleans, La.
Hon. ALECK BOARMAN, District Judge, W. D. Louisiana.....Shreveport, La.
Hon. HENRY C. NILES, District Judge, N. and S. D. Mississippi.....Kosciusko, Miss.
Hon. DAVID E. BRYANT, District Judge, E. D. Texas.....Sherman, Tex.
Hon. EDWARD R. MEEK, District Judge, N. D. Texas.....Dallas, Tex.
Hon. WALLER T. BURNS, District Judge, S. D. Texas.....Houston, Tex.
Hon. THOMAS S. MAXEY, District Judge, W. D. Texas.....Austin, Tex.

## SIXTH CIRCUIT.

Hon. JOHN M. HARLAN, Circuit Justice.....Washington, D. C.
Hon. HORACE H. LURTON, Circuit Judge.....Nashville, Tenn.
Hon. HENRY F. SEVERENS, Circuit Judge.....Kalamazoo, Mich.
Hon. JOHN K. RICHARDS, Circuit Judge.....Cincinnati, Ohio.
Hon. ANDREW M. J. COCHRAN, District Judge, E. D. Kentucky.....Maysville, Ky.
Hon. WALTER EVANS, District Judge, W. D. Kentucky.....Louisville, Ky.
Hon. HENRY H. SWAN, District Judge, E. D. Michigan.....Detroit, Mich.
Hon. LOYAL E. KNAPPEN, District Judge, W. D. Michigan.....Grand Rapids, Mich.
Hon. AUGUSTUS J. RICKS, District Judge, N. D. Ohio [5].....Cleveland, Ohio.
Hon. ROBERT W. TAYLER, District Judge, N. D. Ohio.....Cleveland, Ohio.
Hon. ALBERT C. THOMPSON, District Judge, S. D. Ohio.....Cincinnati, Ohio.
Hon. CHARLES D. CLARK, District Judge, E. and M. D. Tennessee....Chattanooga, Tenn.
Hon. JOHN E. McCALL, District Judge, W. D. Tennessee.....Memphis, Tenn.

[3] Died February 4, 1907.
[4] Appointed February 20, 1907, to succeed Judge Parlange.
[5] Died December 22, 1906.

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# SEVENTH CIRCUIT.

Hon. WILLIAM R. DAY, Circuit Justice.....Washington, D. C.
Hon. PETER S. GROSSCUP, Circuit Judge.....Chicago, Ill.
Hon. FRANCIS E. BAKER, Circuit Judge.....Indianapolis, Ind.
Hon. WILLIAM H. SEAMAN, Circuit Judge.....Sheboygan, Wis.
Hon. CHRISTIAN C. KOHLSAAT, Circuit Judge.....Chicago, Ill.
Hon. KENESAW M. LANDIS, District Judge, N. D. Illinois.....Chicago, Ill.
Hon. SOLOMON H. BETHEA, District Judge, N. D. Illinois.....Chicago, Ill.
Hon. FRANCIS M. WRIGHT, District Judge, E. D. Illinois.....Urbana, Ill.
Hon. J. OTIS HUMPHREY, District Judge, S. D. Illinois.....Springfield, Ill.
Hon. ALBERT B. ANDERSON, District Judge, Indiana.....Indianapolis, Ind.
Hon. JOSEPH V. QUARLES, District Judge, E. D. Wisconsin.....Milwaukee, Wis.
Hon. ARTHUR L. SANBORN, District Judge, W. D. Wisconsin.....Madison, Wis.

# EIGHTH CIRCUIT.

Hon. DAVID J. BREWER, Circuit Justice.....Washington, D. C.
Hon. WALTER H. SANBORN, Circuit Judge.....St. Paul, Minn.
Hon. WILLIS VAN DEVANTER, Circuit Judge.....Cheyenne, Wyo.
Hon. WILLIAM C. HOOK, Circuit Judge.....Leavenworth, Kan.
Hon. ELMER B. ADAMS, Circuit Judge.....St. Louis, Mo.
Hon. JACOB TRIEBER, District Judge, E. D. Arkansas.....Little Rock, Ark.
Hon. JOHN H. ROGERS, District Judge, W. D. Arkansas.....Ft. Smith, Ark.
Hon. ROBERT E. LEWIS, District Judge, Colorado. .....Denver, Colo.
Hon. HENRY THOMAS REED, District Judge, N. D. Iowa.....Cresco, Iowa.
Hon. SMITH McPHERSON, District Judge, S. D. Iowa.....Red Oak, Iowa
Hon. JOHN C. POLLOCK, District Judge, Kansas.....Topeka, Kan.
Hon. WM. LOCHREN, District Judge, Minnesota.....Minneapolis, Minn.
Hon. PAGE MORRIS, District Judge, Minnesota.....Duluth, Minn.
Hon. GUSTAVUS A. FINKELNBURG, District Judge, E. D. Missouri[6].....St. Louis, Mo.
Hon. JOHN F. PHILIPS, District Judge, W. D. Missouri.....Kansas City, Mo.
Hon. W. H. MUNGER, District Judge, Nebraska.....Omaha, Neb.
Hon. CHARLES F. AMIDON, District Judge, North Dakota.....Fargo, N. D.
Hon. JOHN E. CARLAND, District Judge, South Dakota.....Sioux Falls, S. D.
Hon. JOHN A. MARSHALL, District Judge, Utah.....Salt Lake City, Utah.
Hon. JOHN A. RINER, District Judge, Wyoming.....Cheyenne, Wyo

# NINTH CIRCUIT.

Hon. JOSEPH McKENNA, Circuit Justice.....Washington, D. C.
Hon. WILLIAM B. GILBERT, Circuit Judge.....Portland, Or.
Hon. WM. W. MORROW, Circuit Judge.....San Francisco, Cal
Hon. ERSKINE M. ROSS, Circuit Judge.....Los Angeles, Cal.
Hon. JOHN J. DE HAVEN, District Judge, N. D. California.....San Francisco, Cal.
Hon. OLIN WELLBORN, District Judge, S. D. California.....Los Angeles, Cal.
Hon. JAMES H. BEATTY, District Judge, Idaho.....Boise City, Idaho.
Hon. WILLIAM H. HUNT, District Judge, Montana.....Helena, Mont.
Hon. EDWARD S. FARRINGTON, District Judge, Nevada.....Carson City, Nev.
Hon. CHARLES E. WOLVERTON, District Judge, Oregon.....Portland, Or.
Hon. EDWARD WHITSON, District Judge, E. D. Washington.....Spokane, Wash.
Hon. CORNELIUS H. HANFORD, District Judge, W. D. Washington.....Seattle, Wash.

[6] Resigned March 31, 1907.

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# CASES

## ARGUED AND DETERMINED

IN THE

# UNITED STATES CIRCUIT COURTS OF APPEALS.

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(148 Fed. 799.)

### LANGE v. ROBINSON et al.

(Circuit Court of Appeals, Ninth Circuit. October 22, 1906.)

No. 1,295.

1. MINES AND MINERALS—LOCATION OF MINING CLAIM—DISCOVERY.

The object of the law in requiring a discovery to precede the location of a mining claim is to insure good faith on the part of the locator and prevent frauds upon the government, and to constitute a discovery which will support the location of a gold placer claim as against another mineral claimant it is not necessary that gold should have been found thereon in paying quantity, but there must have been such a discovery of gold as gives reasonable evidence that the ground is valuable for placer mining, taking into consideration its character, location, and surroundings.[1]

2. SAME.

Plaintiff located certain gold placer mining claims along a creek in Alaska, and before doing so washed on each a few pans of the sediment deposited along the sides of the creek, and in each found small particles or colors of gold. Placer gold in paying quantities had been found on the bed rock on a tributary to the creek, and within a mile of such locations, and the bed rock at the place of the locations was from 125 to 150 feet below the surface. Plaintiff and other experienced miners testified that the gold found was sufficient to reasonably justify the investment of money to sink shafts. *Held*, that there was a sufficient discovery to support the locations as against another mineral claimant.

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[1] See note at end of case.



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3. SAME—ACTION AGAINST ADVERSE CLAIMANT—ALASKA STATUTE.

**A plaintiff who was living in a tent on one of a number of adjoining mining claims owned by him, and had commenced the sinking of a shaft thereon, had sufficient possession to entitle him to maintain a suit under Alaska Code of June 6, 1900, c. 786, 31 Stat. 321, against an adverse claimant of the ground.**

Appeal from the District Court of the United States for the Third Division of the District of Alaska.

Carr & Nye, for appellant.

J. C. Campbell, W. H. Metson, and McGinn & Sullivan, for appellees.

Before GILBERT and ROSS, Circuit Judges, and DE HAVEN, District Judge.

DE HAVEN, District Judge. This action was commenced in the District Court for the District of Alaska, Third Division, for the purpose of determining that the plaintiff is the owner and entitled to the possession of certain mineral lands, to which the defendants assert an adverse claim. At the conclusion of the evidence offered by the plaintiff the defendants moved for a dismissal of the action upon the ground that the plaintiff had failed to show that he had any legal or equitable estate in the land described in the complaint, and for the further reason that it was not shown that he was in possession of such land at the date of the commencement of the action. The motion was granted upon the ground first stated, and it was thereupon adjudged that the action be "dismissed without prejudice against the plaintiff of any kind whatsoever," the defendants to recover costs. From this judgment the plaintiff has appealed.

The lands in controversy embrace 10 separate placer mining claims, containing 20 acres each. One of these claims was located by H. W. Benson, grantor of plaintiff, one by the plaintiff for himself, and the remaining eight by the plaintiff acting as agent for others, who have since conveyed to him. The locations were made on April 15, 1905; and the first question which we will consider is whether prior to that date the locators had made such a discovery of gold thereon as entitled them to locate the lands as placer mining claims. These claims are situate on Cripple creek in the Fairbanks mining district, Alaska, and the evidence shows that prior to their location gold had been found on Esther creek, a tributary of Cripple creek. This discovery was made within less than one mile from the land in controversy. In Alaska, as indeed in all places where there is placer gold, it is almost the universal rule that the "pay streak," so called, is in and upon, or near, the bed rock; and until that is reached it cannot be determined whether any particular claim contains gold in such quantity as to be of value for placer mining. The bed rock on Esther creek is from 90 to 100 feet below the surface, while upon the land involved in this action this rock is from 125 to 150 feet below the surface, and the overlying ground is of no value; that is, it does not contain sufficient gold to pay for working it. The plaintiff is a miner of many years' experience, and testified, in sub-

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stance, that before making his locations he washed upon each claim a few pie plates of the sediment deposited in and along the sides of the creek upon which the claims are located, and found in the several washings from two to six fine colors of gold. This was all of the gold actually discovered by him before he made the locations. The plaintiff also testified that his belief that there was gold on the bed rock of the claims located by him was based upon the colors which he had found, and the further facts that the same general character of sediment deposit and rock and soil formation were found on these claims as on the mineral land on Esther creek, and that in all localities where placer mining is conducted, wherever gold is found on the surface, there will be more or less on the bed rock. He also stated that the "pay streak" in lands of this character is narrow, and usually confined within the limits of an old channel, that it is often found necessary to sink many shafts before it is located, and that the sinking of shafts to such depths as is required upon the lands in controversy would be very expensive. In addition to this, one Field, an experienced miner, who prospected the ground after the locations had been made by plaintiff, and discovered therein colors of fine gold such as were found by plaintiff, testified as follows:

"Q. What would you say to the reasonableness of a man's pursuing the work of prospecting a creek where he found such indications of gold as you found there at that time, as to whether or not he would be justified in doing so?

"A. The reasonableness? Well, it is looked upon as a business proposition that after a man gets surface indication such as you find down there—that it is looked upon as a business proposition that is sufficient to justify him in expending time and money in exploring it further. There is a large amount of money invested under those conditions."

1. It will be noticed from the foregoing statement of facts that prior to making the locations under consideration plaintiff did not actually discover gold in paying quantities upon the claim located; but he did find some small particles of gold therein. Was this sufficient to give to the plaintiff the right to locate as placer mining claims the lands upon which this gold was found?

The question as to what constitutes a sufficient discovery upon which to base a valid location of a vein or lode of quartz, or other rock bearing gold or silver deposits, has often been before the courts, and a few of the decisions in relation thereto will be referred to, as the rule which they declare concerning the quantity or the value of the precious metals necessary to be found in the vein or lode before it can be located is applicable in principle in determining whether there has been a sufficient discovery of mineral-bearing earth to authorize the location of a placer mining claim. In Book v. Justice Min. Co. (C. C.) 58 Fed. 106, Judge Hawley said:

"When the locator finds rock in place containing mineral, he has made a discovery within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery, and warrants the prospector in making a location of a mining claim."

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This view is repeated by the same learned judge, in delivering the opinion of this court, in Migeon v. Montana Cent. Ry. Co., 77 Fed. 249, 23 C. C. A. 156, in the following language:

"The question as to what constitutes a discovery of a vein or lode under the provisions of section 2320 of the Revised Statutes [U. S. Comp. St. 1901, p. 1424] has been decided by many courts. All the authorities cited by appellants are referred to in Book v. Mining Co. (C. C.) 58 Fed. 106, 121. The liberal rules therein announced are substantially to the effect that, when a locator of a mining claim finds rock in place containing mineral in sufficient quantity to justify him in expending his time and money in prospecting and developing the claim, he has made a discovery within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low, with this qualification: That the definition of a lode must always have special reference to the formation and peculiar characteristics of the particular district in which the lode or vein is found. It was never intended that in such a case the courts should weigh scales to determine the value of the mineral found as between a prior and subsequent locator of a mining claim on the same lode."

In Shoshone Min. Co. v. Rutter, 87 Fed. 807, 31 C. C. A. 223, this court again had occasion to consider what constitutes a discovery of a vein or lode, or quartz-bearing lode, in place; and, in sustaining the validity of the location in controversy in that case, said:

"The discovery was made in running a tunnel, where small seams of iron oxide, quartz, and small quantities of carbonate of lead were found, two or three inches wide. These indications were of such a character as miners in that district would follow in the expectation of finding ore, and such as would justify miners in working a claim for that purpose. The rock in these seams was different from the country rock, and was of such a character as is designated by the witnesses, who were practical miners, 'as a vein containing rock in place, bearing mineral.' These facts show that the location was made in good faith, and not 'simply upon a conjectural or imaginary existence of a vein or lode,' which cannot be permitted. King v. Mining Co., 152 U. S. 222, 227, 14 Sup. Ct. 510, 38 L. Ed. 419. The seams containing mineral-bearing earth and rock, which were discovered before the location was made, were similar in their character to the seams or veins of mineral matter that had induced other miners to locate claims in the same district, which by continued developments thereon had resulted in establishing the fact that the seams, as depth was obtained thereon, were found to be a part of a well-defined lode or vein containing ore of great value. The discovery made at the time of the Kirby location was, therefore, such as to justify a belief as to the existence of such a lode or vein within the limits of the ground located."

In Erhardt v. Boaro, 113 U. S. 536, 5 Sup. Ct. 564, 28 L. Ed. 1113, the Supreme Court say:

"A mere posting of a notice on a ridge of rocks cropping out of the earth, or on other ground, that the poster has located thereon a mining claim, without any discovery or knowledge on his part of the existence of metal there, or in its immediate vicinity, would be justly treated as a mere speculative proceeding, and would not itself initiate any right. There must be something beyond a mere guess on the part of the miner to authorize him to make a location which will exclude others from the ground, such as the discovery of the presence of the precious metals in it, or in such proximity to it as to justify a reasonable belief in their existence."

In Nevada Sierra Oil Co. v. Home Oil Co. (C. C.) 98 Fed. 673, the court, after citing with approval the rule above quoted from the opinion in Book v. Justice Min. Co. (C. C.) 58 Fed. 106, as to what is a sufficient discovery of lode or vein claims, said:

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"So, in respect to placer claims, if a competent locator actually finds upon unappropriated public land petroleum or other mineral in or upon the ground, and so situated as to constitute a part of it, it is a sufficient discovery, within the meaning of the statute, to justify a location under the law, without waiting to ascertain by exploration whether the ground contains the mineral in sufficient quantities to pay."

We do not understand that any different rule is laid down in Chrisman v. Miller, 197 U. S. 313, 25 Sup. Ct. 468, 49 L. Ed. 770. On the contrary, the court in that case quotes with apparent approval the following language of the Land Department in the case of Castle v. Womble, 19 Land. Dec. Dep. Int. 455, 457:

"When minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. To hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby 'all valuable mineral deposit in lands belonging to the United States * * * are * * * declared to be free and open to the exploration and purchase.'"

And then as a result of all the authorities cited in its opinion, the court deduces the rule:

"That there must be such a discovery of mineral as gives reasonable evidence of the fact either that there is a vein or lode carrying the precious mineral, or if it be claimed as placer ground that it is valuable for such mining."

The question of discovery is in every case one of fact for the court or jury. Iron Silver Co. v. Mike & Starr Co., 143 U. S. 394, 12 Sup. Ct. 543, 36 L. Ed. 201. There must be some gold found within the limits of the land located as a placer gold claim, but it cannot be said in advance as a matter of law how much must be found in order to warrant the court or jury in finding that there was in fact a discovery such as the law requires. The question must be decided, not only with reference to the gold actually found within the limits of the claim located, but also in view of its situation with reference to other lands known to contain valuable deposits of placer gold, and whether its rock and soil formation are such as is usually found where these deposits exist in paying quantities; and, further, in considering the evidence bearing upon the general question, it must not be forgotten that the object of the law in requiring the discovery to precede location is to insure good faith upon the part of the mineral locator, and to prevent frauds upon the government by persons, "attempting to acquire patents to land not mineral in its character." Shoshone Min. Co. v. Rutter, 87 Fed. 801, 31 C. C. A. 223. And where the controversy is, as in this case, between persons claiming the land as mineral, "the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry, for the reason that where land is sought to be taken out of the category of agricultural lands the evidence of its mineral character should be reasonably clear, while in respect to mineral lands, in a controversy between claimants, the question is simply which is entitled to priority." Chrisman v. Miller, 197 U. S. 313–323, 25 Sup. Ct. 468, 49 L. Ed. 770.

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Our conclusion is that, under the rule stated in the cases to which we have referred, the plaintiff and his grantors made a sufficient discovery of gold upon the lands in controversy to entitle them to make a valid location of the same as placer claims, under the laws of the United States. There was an actual discovery of gold upon each of the claims located. They are situated near other lands presenting the same surface indications, which at the date of the location of these claims were known to be valuable for the placer gold which they contained; and these facts, according to the uncontradicted testimony of the plaintiff and that of the witness Field, above quoted, were sufficient to justify the expenditure of money for the purpose of their exploration, with the reasonable expectation that, when developed, they would be found valuable as placer mining claims. This was in our opinion all that was necessary.

2. The action was brought under section 475 of the act of June 6, 1900, entitled, "An act making further provision for a civil government for Alaska, and for other purposes." Chapter 786, 31 Stat. 321. This section provides:

"Any person in possession, by himself or his tenant, of real property, may maintain an action of an equitable nature against another who claims an estate or interest therein adverse to him for the purpose of determining such claim, estate, or interest." Chapter 786, 31 Stat. 410.

It was incumbent upon the plaintiff, in order to maintain the action under this statute, to show an actual possession of the land in controversy, or some part thereof, at the date of the commencement of the action. Sepulveda v. Sepulveda, 39 Cal. 13; Durell v. Abbott et al. (Wyo.) 44 Pac. 647. The evidence shows that plaintiff was living upon claim No. 11, in a tent, at the time the action was commenced, and had also begun to sink a shaft thereon as a preliminary step in prospecting or developing the same as a mining claim. This constituted a sufficient possession of that particular mining claim under the statute; and we are also of the opinion that there was sufficient evidence to show plaintiff's possession of the other claims described in the complaint. These claims, as we hold, were properly located as mining claims, and in such case slight acts of dominion will constitute a sufficient possession to enable the locator to maintain an action under the section above quoted.

Judgment reversed, and cause remanded for a new trial.

## NOTE.

### Sufficiency of Discovery of Mineral Characteristics to Support Mining Location.

#### I. In General.

[a] (U. S. 1880) On the public domain of the United States a miner may hold the place in which he may be working against all others having no better right: but, when he asserts title to a full claim of 1,500 feet in length and 300 feet in width, he must prove a lode extending throughout the claim. —Zollars v. Evans (C. C.) 5 Fed. 172, 2 McCrary, 39.

[b] (Cal. 1901) An actual mineral discovery is essential to the valid location of a mining claim.—Tuolumne Consol. Min. Co. v. Maier, 134 Cal. 583, 66 Pac. 863.

[c] (Colo. 1877) If a located lode terminates at any point within the location, or departs at any point from the side lines, the location beyond such point

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to that extent is defeasible, if not void, before patent.—Patterson v. Hitchcock 3 Colo. 533.

[d] (Colo. 1900) Under Rev. St. U. S. § 2320 [U. S. Comp. St. 1901, p. 1424] providing that a location of a mining claim shall not be valid until a mineral-bearing vein has been discovered, and 2 Mills' Ann. St. § 3152, providing that before filing a location for a mining claim the discoverer shall locate his claim by sinking a discovery shaft on the lode to the depth of at least 10 feet from the lowest part of the rim on such shaft at the surface, the shaft so dug must expose the vein on which the location is based, and it is not sufficient that a discovery is made of some other vein within the limits of the claim.—Beals v. Cone, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92.

## II. What Constitutes Vein or Lode.

[a] (U. S. 1898) Seams containing mineral-bearing earth and rock, discovered on a claim before its location, were similar to seams that had induced other miners to locate claims in the same district, and which by development had proved to be a part of a well-defined lode or vein containing ore of great value. *Held* a sufficient compliance with Rev. St. § 2320 [U. S. Comp. St. 1901, p. 1424], requiring the discovery of a lode or vein within the limits of a claim before a valid location thereof can be made.—Shoshone Min. Co. v. Rutter, 87 Fed. 801, 31 C. C. A. 223.

[b] (U. S.) A vein or lode authorized to be located is a seam or fissure in the earth's crest filled with quartz or other rock, in place, carrying gold or other mineral as named in the statute. It may be very thin or very thick, and rich or poor, provided it has a trace of one of the named minerals; but it must be more than detached pieces of quartz or mere bunches of quartz not in place.—(1880) North Noonday Min. Co. v. Orient Min. Co. (C. C.) 1 Fed. 522, 6 Sawy. 299; (1881) Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C.) 11 Fed. 666, 7 Sawy. 96.

[c] (U. S. 1886) If the entire mass of limestone in which a body of ore lies has been mineralized in the same way as the body of ore, and to some extent, and the body of ore is a casual concentration of unusual richness, the body of ore is not a lode.—Hyman v. Wheeler (C. C.) 29 Fed. 347.

[d] (U. S. 1886) An impregnation of mineral in rock, to the extent to which it may be traced as a body of ore, is a vein, lode, or ledge, under Rev. St. § 2320 [U. S. Comp. St. 1901, p. 1424], whether the ore is separated from the country rock by planes or strata of that rock visible to the eye, or is determinable in other ways, as by assay and analysis.—Hyman v. Wheeler (C. C.) 29 Fed. 347.

[e] (U. S. 1886) Strata lying along the plane of contact between blue and brown limestone, if mineralized to the extent of showing valuable minerals, and distinguishable from other parts of the country rock by carrying ore, and by association with the plane of contact, constitute a lode, as far as the strata lying on or near the contact may show ore in appreciable quantities.—Hyman v. Wheeler (C. C.) 29 Fed. 347.

[f] (U. S. 1886) A body of mineral or mineral-bearing rock, in the general mass of country rock, so far as it may continue unbroken and without interruption, is a lode, whatever the boundaries may be. If there are well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode.—Hyman v. Wheeler (C. C.) 29 Fed. 347.

[g] (U. S.) The terms "vein" and "lode" as used by miners and in the mining acts of Congress, are applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock.—(1893) Book v. Justice Min. Co. (C. C.) 58 Fed. 106; (1877) Eureka Consol. Min. Co. v. Richmond Min. Co., Fed. Cas. No. 4,548 [4 Sawy. 302], affirmed Richmond Min. Co. v. Eureka Consol. Min. Co. (1880) 103 U. S. 839, 26 L. Ed. 557; (1879) Stevens v. Williams, Fed. Cas. No. 13,413 [1 McCrary, 480].

[h] (U. S. 1893) Where within a belt of yellow porphyry are numerous seams, crevices, fissures, and deposits where the quartz rock and decomposed rock and matter are found, containing mineral sufficiently diffused to justify miners in giving to the yellow porphyry the general designation of "mineralized matter—metal-bearing rock," it constitutes a vein or lode, authorizing a valid location.—Book v. Justice Min. Co. (C. C.) 58 Fed. 106.

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[i] (U. S. 1893) Any discovery of quartz or other rock in place, bearing any of the precious metals specified in Rev. St. § 2320, cl. 1 [U. S. Comp. St. 1901, p. 1424], constitutes a "discovery of a vein or lode," within the meaning of those words as used in the last clause of said section, which declares that "no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located."—Book v. Justice Min. Co. (C. C.) 58 Fed. 106.

[j] (U. S. 1894) To constitute a vein it is not necessary that there be a clean fissure, filled with mineral, as it may exist when filled in places with other matter, but the fissure must have form, and be well defined, with hanging and foot walls.—Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C.) 63 Fed. 540.

[k] (U. S. 1887) A lode is a zone, belt or body of quartz or other rock lodged in the earth's crust, and presenting two essential and inherent characteristics, viz.: (1) It must be held "in place" within or by the adjoining country rock; and (2) it must be impregnated with some of the minerals or valuable deposits mentioned in the statute. The finding of such a belt, zone, or body is a discovery, within the meaning of the statute, and will authorize the location of a lode claim.—Meydenbauer v. Stevens (D. C.) 78 Fed. 787.

[l] (U. S. 1879) While metalliferous rock in place, not in a fissure, may be found under such conditions within clearly defined boundaries as to require recognition as a vein or lode, a broad metalliferous zone, having within its limits true fissure veins plainly bounded, cannot be regarded as a single vein or lode, although such zone may itself have boundaries which can be traced.—Mt. Diablo Mill. & Min. Co. v. Callison, Fed. Cas. No. 9,886 [5 Sawy. 439].

[m] (U. S. 1879) Whether or not that which is commonly called "the contact" is to be regarded as a lode or vein is to be judged of by its value, whatever may the rule in regard to true fissures; and it is immaterial whether the material found is or is not sometimes or often associated with valuable ore in the deposits of the neighborhood. If there is some mineral of value, something more than a mere trace, it is sufficient; e. g., an ounce of silver.—Stevens v. Gill. Fed. Cas. No. 13,398.

[n] (U. S. 1879) "Vein," or "lode," as used in Act May 10, 1872, embraces any description of deposit which is inclosed in the general mass of the country rock, without regard to the technical geological distinctions in respect to beds, segregated veins, gash veins, true fissure veins, or mere deposits; and it is immaterial as to the character of the vein matter, whether it be in a solid, or in a loose, disintegrated, state.—Stevens v. Williams, Fed. Cas. No. 13,414.

[o] (Ariz. 1905) Under the federal statute providing that no location shall be made "till the discovery of the vein or lode within the limits of the claim," it is enough that gold and silver bearing rock showing on the surface is found.—Score v. Griffin, 80 Pac. 331.

[p] (Cal. 1887) The word "lode" is properly defined as a "zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock," and does not apply to a bed of gravel from which particles of gold may be washed, although such gravel may be inclosed within defined boundaries.—Gregory v. Pershbaker, 73 Cal. 109, 14 Pac. 401.

[q] (Cal. 1906) A quartz vein which contains so small a portion of gold, silver, etc., as to be of no value for mining purposes, is not a known vein, within Rev. St. U. S. § 2333 [U. S. Comp. St. 1901, p. 1433], providing for the disposition of mining claims.—Mutchmor v. McCarty, 87 Pac. 85.

[r] (Idaho, 1890) Though, to constitute a vein, it is not required that well-defined walls be developed or paying ore found within them, there must be rock, clay, or earth so colored or decomposed by the mineral element as to mark and distinguish it from the inclosing country.—Burke v. McDonald, 2 Idaho (Hasb.) 679, 33 Pac. 49.

[s] (Utah, 1881) A "lode" or "vein," within the meaning of those terms as used in the mining acts, is that which is so called by miners.—Harrington v. Chambers, 3 Utah, 94, 1 Pac. 362.

### III. What Constitutes "in Place."

[a] (U. S. 1881) A vein or lode is in place if the ore body is continuous to the extent that it may maintain that character, whether deposited in that

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form or removed bodily with its inclosing rocks to the place in which it may be found.—Iron Silver Min. Co. v. Cheesman (C. C.) 8 Fed. 297, 2 McCrary, 191.

[b] (U. S. 1878) Where the mass overlying the ore is mere drift, or a loose deposit, the ore is not a vein "in place," within the meaning of Rev. St. § 2320 [U. S. Comp. St. 1901, p. 1424].—Tabor v. Dexler, Fed. Cas. No. 13,723.

[c] (U. S. 1879) "Rock in place" as used in Rev. St. § 2320 [U. S. Comp. St. 1901, p. 1424], means that the lode or vein must be inclosed by the fixed and immovable rock forming the general mass of the mountain. There must, therefore, be a hanging as well as a foot wall; but, if the principal part of the rock above the mineral is in its original position, the lode is in place, although some masses of rock or bowlders may be mixed with the ore. If, however, the ore is upon the top of the immovable rock, and covered only by loose material and débris, the section does not apply.—Leadville Co. v. Fitzgerald, Fed. Cas. No. 8,158.

[d] (U. S. 1879) "In place," as used in the act of Congress in respect to veins or lodes, means in the general mass of the mountain, as distinguished from merely on the surface or covered only by the movable parts called "slide" or "débris."—Stevens v. Gill, Fed. Cas. No. 13,398.

[e] (U. S. 1879) The words, "in place," as used in Act Cong. May 10, 1872, as descriptive of the lodes or veins for which mining claims may be taken out under the act, mean "surrounded by the general body of the country," which remains in its original state, unaffected by the action of the elements, as distinguished from the superficial mass known as alluvium, detritus, or débris. It is what miners usually call the "country," or the "country rock"; and a vein or lode is "in place," within the meaning of the act, when it is inclosed in the general mass of this rock.—Stevens v. Williams, Fed. Cas. No. 13,414.

## IV. Discovery of Mineral in Vein.

[a] (U. S. 1892) The apex of a vein is not necessarily a point, but often a line of great length, and any portion of the apex on the course or strike of the vein found within the limits of a claim is a sufficient discovery to entitle the locator to obtain title.—Larkin v. Upton, 144 U. S. 19, 12 Sup. Ct. 614, 36 L. Ed. 330, affirming Upton v. Larkin (1888) 7 Mont. 449, 17 Pac. 728.

[b] (U. S. 1889) It is requisite to a valid location and to the ownership of the title to a lode mining claim, that there should be a discovery of ore, gold or silver bearing mineral in rock in place, showing a well-defined crevice, a discovery at least 10 feet deep from the lowest rim rock thereof, which discovery must be at the point claimed and designated, or made the point of discovery by the locators of said claim, and so designated in the location certificate.—Cheesman v. Shreeve (C. C.) 40 Fed. 787.

[c] (U. S. 1893) The fact that three tons of silver-bearing rock, yielding $600, have been extracted from a mining claim, does not entitle the locator to enter the claim for a patent when no vein or lode has been discovered within the limits of the claim, the location having been made merely in the hope of finding such at some future time.—Waterloo Min. Co. v. Doe (C. C.) 56 Fed. 685.

[d] (U. S. 1893) When the locator finds rock in place, containing mineral, he has made a discovery, within the meaning of the statute, whether the rock or earth assays high or low.—Book v. Justice Min. Co. (C. C.) 58 Fed. 106.

[e] (Cal. 1900) Evidence that, prior to the location of the claim in question, plaintiffs had sunk a shaft 25 or 30 feet, and had taken from it a considerable amount of quartz rock, which formed a dump, and that rich rock was found, and that in surveying the claim the surveyor measured along the lode line, taking his directions for the course of the vein from a line drawn from the shaft through two or three prospect holes where the ledge was exposed, together with the admission of the contesting claimant that the rock taken out was gold-bearing, is sufficient to show that a gold-bearing lode or vein had been discovered by plaintiffs within their claim at the time the location was made.—Conway v. Hart, 129 Cal. 480, 62 Pac. 44.

[f] (Idaho, 1892) A valid location of a lode mining claim may be made on a vein whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following, with the expectation

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of finding ore; and it is not necessary that the prospector be "justified" in his expectation of finding ore.—Burke v. McDonald, 3 Idaho (Hasb.) 296, 29 Pac. 98.

[g] (Idaho, 1892) A valid location of a lode mining claim may be made of a ledge deep in the ground and appearing at the surface, not as ore, but as vein matter only.—Burke v. McDonald, 3 Idaho (Hasb.) 296, 29 Pac. 98.

[h] (Mont. 1887) An instruction on the question of discovery as follows: "It is not necessary that the work by which the discovery vein or lead is discovered and made visible should be made by the locators. It is sufficient if, at the time of the location, the vein or lead is exposed to view, and its existence shown by the locator, for these facts would be equivalent to discovery"—is correct, if accompanied by other instructions fully setting forth the law on other points.—Wenner v. McNulty, 7 Mont. 30, 14 Pac. 643.

[i] (Mont. 1888) An instruction that, "to make a valid location of a lode mining claim, there must be a discovery, within the limits of the claim, of a vein * * * containing gold, silver, or other valuable mineral deposits, * * *" is proper, in connection with other instructions defining and limiting what is meant by a "discovery."—Upton v. Larkin, 7 Mont. 449, 17 Pac. 728.

[j] (Mont. 1891) Rev. St. U. S. § 2319 [U. S. Comp. St. 1901, p. 1424], declares that all "valuable" mineral deposits in lands belonging to the United States are free and open to exploration and purchase, and the lands in which they are found to occupation and purchase. Section 2322 [U. S. Comp. St. 1901, p. 1425], provides that the locators of all mining locations on any mineral vein, lode, or ledge shall have the exclusive right of possession and enjoyment thereof. Comp. St. div. 5, § 1477, provides that, in order to entitle any person to record any lead, lode, or ledge, there shall first be discovered thereon a vein or crevice of quartz or ore with at least one well-defined wall. *Held*, that a paying lode or vein need not be discovered to entitle a locator to a valid location, but it is sufficient if the lode contain such indications of minerals that he is willing to spend his time and money in expectation of finding ore sufficiently valuable to work.—Shreve v. Copper Bell Min. Co., 11 Mont. 309, 28 Pac. 315.

[k] (Mont. 1896) Under Rev. St. U. S. § 2320 [U. S. Comp. St. 1901, p. 1424], providing that no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located, it is the finding of mineral in rock in place that constitutes the discovery, and it is not necessary that the vein or lode should contain mineral of such nature that a practical miner, if he encountered it, would feel justified in following it up, with the reasonable expectation of finding paying mineral.—McShane v. Kenkle, 18 Mont. 208, 44 Pac. 979, 33 L. R. A. 851, 56 Am. St. Rep. 579.

[l] (Mont. 1896) Nor is it required, under the statute, that the paying mineral necessary to justify the location of the claim should be found at the time and place of the discovery, but it is sufficient if the development of the vein showed that paying mineral exists within the limits of the location.—McShane v. Kenkle, 18 Mont. 208, 44 Pac. 979, 33 L. R. A. 851, 56 Am. St. Rep. 579.

[m] (Nev. 1906) When a locator of a mining claim finds rock in place containing a mineral in sufficient quantity to justify him in expending his time and money in prospecting and developing the claim, he has made a discovery within Rev. St. U. S. § 2320 [U. S. Comp. St. 1901, p. 1424], providing for priority of location rights on the discovery of mineral in the public domain, whether the rock or earth is rich or poor, provided that in a lode claim the lode must have special reference to the formation and peculiar characteristics of the particular district in which it is found.—Fox v. Myers, 86 Pac. 793.

### V. Discovery of Vein in Tunnel Claims.

[a] Where one duly locates a tunnel claim under Rev. St. § 2323 [U. S. Comp. St. 1901, p. 1426], and discovers a mineral lode in the tunnel, he is not bound to make another discovery of the lode from the surface.

—(U. S. 1892) Rico-Aspen Consol. Min. Co. v. Enterprise Min. Co. (C. C.) 53 Fed. 321;

(Colo. 1893) Ellet v. Campbell, 18 Colo. 510, 33 Pac. 521.

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[b] (Colo. 1878) Mineral must be discovered before there can be a location of a surface lode or a lode in a tunnel.—Corning Tunnel Co. v. Pell, 4 Colo. 507.

VI. PLACER CLAIMS.

[a] (U. S. 1906) In an action to recover certain land which was a part of the public domain, plaintiff claimed under a placer mining location. The court charged that it was essential to the validity of such location that the discovery of mineral thereon was such that an ordinarily prudent man, not necessarily a miner, would be justified in expending his time and labor in developing the property, but in the same connection declared that it was essential to a recovery by plaintiffs that they prove with reasonable clearness that for the labor and capital expended in working the ground, it would yield a reasonable profit. *Held*, that the latter instruction was erroneous, and in conflict with the correct rule previously charged.—Cascaden v. Bartolis, 146 Fed. 739, 77 C. C. A. 496.

[b] (U. S. 1906) Under the established rule that, when public land is sought to be taken out of the category of agricultural lands, the evidence of its mineral character should be reasonably clear, the finding of colors of gold, even though fairly good prospects of gold, in placer prospecting, is not sufficient to establish the mineral character of the ground and to sustain a mineral location thereof as against a prior entry under the homestead laws.—Steele v. Tanana Mines R. Co., 148 Fed. 678, 78 C. C. A. 412.

[c] (U. S. 1899) To constitute a prior discovery which will support a location of public ground as an oil placer claim under the mining laws, the locator must have actually discovered oil within the limits of the claim. Mere surface indications of the existence of oil therein, however strong, are not sufficient, nor is the existence of oil upon adjoining lands.—Nevada Sierra Oil Co. v. Home Oil Co. (C. C.) 98 Fed. 673.

[d] (Cal. 1903) Act Cong. Feb. 11, 1897, c. 216, 29 Stat. 526 [U. S. Comp. St. 1901, p. 1434], provides that the location of oil claims shall be governed by the mineral laws of the United States applicable to the location of placer mining claims. Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1426], provides that the location of any mining claim must be distinctly marked on the ground, and there must be a discovery of minerals within the limits of the land located. *Held*, that to constitute a valid location of an oil claim the locator must have actually discovered oil within the limits of the claim.—Miller v. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63.

[e] (Okl. 1903) It is a condition precedent to the location of a mining claim that a discovery must be made, and in the case of petroleum or mineral oils the deposit from which the oil is drawn must be discovered before a valid location can be made.—Bay v. Oklahoma Southern Gas, Oil & Mining Co., 13 Okl. 425, 73 Pac. 936.

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(149 Fed. 141.)

## McNICOL v. NEW YORK LIFE INS. CO.

(Circuit Court of Appeals, Eighth Circuit November 16, 1906.)

No. 2,369.

1. INSURANCE—LIFE INSURANCE—CONTRACT—EXECUTION.

Deceased applied for insurance in defendant company, and in order to get a reduction in premium requested informally that his application be dated back. At the time of making the application he paid the local agent the premium for the first year, taking a receipt providing that the premium should be returned in case the application should not be accepted. Defendant elected not to accept the application, unless the applicant amended it, formally requesting that the insurance should take effect as of the prior date, and consenting to certain other conditions

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and for this purpose submitted an amended application, with a policy based thereon, which was sent to its local agent with instructions not to deliver until the applicant signed the amended application and paid certain interest on the first premium. The agent wrote the applicant that the policy had arrived "straight as a string" and that he hoped to deliver the same the following Sunday, but insured died before that time without having received the policy, signed the amended application, or paid the additional premium. *Held*, there was no acceptance by deceased of the insurance company's counter proposition, contained in the amended application, sufficient to constitute a contract of insurance.

2. SAME—RECEIPT OF PREMIUM.

The receipt of a first year's premium from an applicant for life insurance, with the qualification that it was conditional on the acceptance by the insurer of the applicant's proposition for insurance as made in his application, and, if the proposition was not accepted, the money should be returned, did not constitute a contract of insurance.

3. SAME—ESTOPPEL.

Defendant insurance company rejected an application for insurance as made, but filled out an amended application and the policy based thereon, and sent the same to its local agent, with instructions not to deliver the policy until insured had signed the amended application and paid the necessary additional premium. The agent wrote the applicant that he had received the policy "straight as a string" and hoped to deliver the same the following Sunday, but the applicant died before signing the amended application or obtaining the policy. *Held*, that the insurance company was not estopped by the letter of the local agent to deny that it had not accepted the applicant's original proposition.

In Error to the Circuit Court of the United States for the District of Kansas.

On December 14, 1903, one McNicol, of Wichita, Kan., made an application to defendant company for a policy of $5,000 on his life, payable at his death to his son, William D. McNicol, the plaintiff in this action. The applicant was born May 8, 1863, and his age on December 14, 1903, for insurance purposes as determined by his nearest birthday, was 41 years; but, to get a reduction in premium corresponding to a year's less age, he requested informally in his application that his policy be dated back to November 7th, which, if done, would secure for him the benefit of a premium based on the age of 40, instead of 41, years. At the time of making the application he paid the local agent of defendant company at Wichita, in a manner satisfactory to him, the premium for the first year, taking a receipt therefor, with a proviso that, if the policy should not be issued by the company on his application, the amount of the payment should be returned to him by the agent. Pursuant to the usual practice, and as contemplated by him, his application was forwarded to the home office of the company in New York for its approval and acceptance. In due time the company determined that it would not accept the application or issue a policy on it, unless the applicant would make a certain amendment to it, formally requesting that the insurance should take effect as of November 7, 1903, instead of December 14, 1903, the date of the application, and agreeing that the accumulation period and the loan and nonforfeiting provisions of the policy should all relate back to November 7th. The company, finding the medical examination accompanying the application satisfactory, caused a policy of $5,000 to be prepared and executed in general conformity to the application, but attached to it a formal amendment of the application, conforming to its requirement as just stated, and returned them both to its local agent with instructions not to deliver the policy to the applicant until the amendment should be signed by the applicant and until he should pay the sum of $1.10 additional premium; the same being interest at the rate of 5 per cent. per annum on the amount of the first annual premium from November 7th, when the policy was to become effective and when the premium was due, to December 14th, when the application was made for the policy and when the premium was actually

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**paid. The local agent received the executed policy and the proposed amendment on January 7, 1904, and on that date wrote McNicol, who lived some distance away, that the policy had arrived "straight as a string" and that he hoped to place it in his hands the following Sunday. When McNicol received this letter on Friday, January 8th, he was sick, and, without any change in the facts of the case from those already stated, he died on the morning of Saturday, January 9th, without having received the policy or paid the additional premium or signed the amendment to his application. The beneficiary instituted suit on the policy in the Circuit Court. The court made a special finding of facts, in substance as just stated, and rendered a judgment in favor of the defendant. We are asked to reverse that judgment on this writ of error.**

Earl Blake (W. A. Ayres and B. F. Milton, on the brief), for plaintiff in error.

S. B. Amidon and James H. McIntosh, for defendant in error.

Before VAN DEVANTER and ADAMS, Circuit Judges, and PHILIPS, District Judge.

ADAMS, Circuit Judge, after stating the facts as above, delivered the opinion of the court. The only question in this case is whether the facts as found support the judgment as rendered. The application made for the insurance was a proposition requiring acceptance as made before it became a contract. Travis v. Insurance Co., 43 C. C. A. 653, 104 Fed. 486. This McNicol, not only presumptively, but actually, knew. The receipt taken by him from the local agent when he paid the first year's premium informed him in effect that the payment was only provisionally received, that his application might not be accepted by the company, and, if it should not be accepted, that the agent would return the amount of the payment to him. The facts conclusively show that the application was not accepted. An amended application was prepared by the company, embodying several material modifications or additions to the one made by McNicol, and the same was forwarded to its local agent for submission to the applicant for his consideration and signature if satisfactory. This amounted to a rejection of the proposition as made by McNicol and a counter proposition by the company to him, which could not become a contract until it was accepted by him. Mutual Life Ins. Co. v. Young, 23 Wall. 85, 23 L. Ed. 152; Minneapolis, &c., Ry. Co. v. Mill, 119 U. S. 149, 7 Sup. Ct. 168, 30 L. Ed. 376. This McNicol never did. He unfortunately died before the counter proposition reached him. The minds of the parties never met and no contract was ever concluded between them.

Plaintiff's counsel contend that, as the policy was actually made out as called for in the original application and delivered to the local agent of the company for the applicant, it thereby became a binding contract. If such were the only facts of the case, their contention might be right; but, as already seen, the record contains much more. The proposition as made in the original application was rejected by the company, and a counter proposition made for the consideration of the applicant. The physical making out and sending of the policy to the local agent in themselves constituted no contract. By special direction of the company they were not to be treated as a delivery of the policy. It was not to be delivered until McNicol complied with the terms and conditions specified in the counter proposition.

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It is next urged that, as defendant's agent received the first year's premium from the applicant, the company thereby insured him. This contention overlooks important facts of the case, and particularly the qualification attending the act of receiving the money. It was distinctly understood at the time that the receipt of the premium was conditional on the acceptance by the company of the applicant's proposition for insurance as made in his application. If the proposition should not be accepted, the money was to be returned; and that was the agreed limit and measure of the company's liability resulting from the receipt of the first year's premium, in case the policy was not issued.

It was argued orally, but not presented in brief of plaintiff's counsel, that the letter of the local agent, written to McNicol after he had received the policy with special instructions not to deliver it until McNicol paid a further premium and signed a new application, estopped the defendant from denying the consummation of the contract. The company or any of its general officers did not write the letter, and the local agent, as the facts of the case show and as McNicol well knew, had no authority to make a contract of insurance without the approval of the company, and a fortiori had no authority to conclude such a contract in express violation of his specific instructions from the company. Moreover, the letter, whether authorized or not, was not written with the intention that McNicol should regard it as an acceptance of his original proposition for insurance. It would have been gross bad faith on the part of the agent, in the light of his instructions, to attempt to convey any such intention. Not only so, but the language of the letter did not justify reliance upon it by McNicol as an acceptance of his original proposition. It informed him that the agent hoped to place the policy in his hands Sunday. Whether he would do so or not depended as a matter of fact upon whether McNicol would comply with the terms and conditions upon which alone he might deliver the policy or place it in his hands. The expression that the agent hoped to deliver it Sunday is suggestive of a doubt as to his ability to do so; and McNicol had no right to rely on the letter without recognizing the suggested doubt. Moreover, there is no showing that McNicol either refrained from acting or took any affirmative action upon the supposition that the letter concluded his contract with the company. It thus appears that several elements which necessarily enter into estoppel by conduct (Bigelow on Estoppel [5th Ed.] p. 26) are wanting in this case, and their absence effectually refutes the contention of counsel. The case, freed from the obscurities suggested by ingenious counsel is, in our opinion, clearly without merit. The fundamental requisite to the consummation of a contract, the aggregatio mentium, never existed. Before it could have been reached, according to the method of negotiation resorted to by the parties, one of them died, and this unfortunate fact put a stop to further negotiations which might or might not have resulted in a contract.

The judgment of the trial court was clearly for the right party, and is accordingly affirmed.

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(149 Fed. 145.)

# In re THROCKMORTON.

(Circuit Court of Appeals, Sixth Circuit. December 4, 1906.)

Nos. 1,450, 1,522.

1. BANKRUPTCY—PETITION FOR REVIEW.

On petition to the Circuit Court of Appeals to review orders of the District Court in bankruptcy proceedings, only questions of law arising out of the facts found or conceded can be considered.

[Ed. Note.—Appeal and review in bankruptcy proceedings, see note to In re Eggert, 43 C. C. A. 9.]

2. SAME—REAL ESTATE—LEASING—ACTS OF TRUSTEES.

At the time of a bankrupt's adjudication, certain of her real estate had been advertised for sale under an order of the state court, and was purchased at the sheriff's sale by F., who immediately leased the farm for $1,200 for the succeeding year. The sheriff's sale was not confirmed, and the land was finally sold by the bankrupt's trustees. On the appointment of the trustees F. turned over to them the tenant's note for the year's rent, and they ratified the lease, after which the tenant paid the note and raised a crop on the land of the value of $8,000. *Held*, that the trustees, after obtaining control of the land, properly ratified such lease as against the rights of the bankrupt.

3. SAME—INTEREST IN LAND—STATE COURTS—JUDGMENT.

Where, prior to the institution of proceedings in bankruptcy, the highest court of the state in which certain land belonging to the bankrupt was located, had held that W. had acquired title to an undivided one-fifth interest therein on foreclosure of a lien for attorney's fees, and the court in such action had jurisdiction both of the parties and subject-matter, such adjudication could not be collaterally attacked in the bankruptcy proceedings, and the trustees in bankruptcy therefore properly recognized W.'s interest in the land.

4. SAME—SALES—PRICE—ADEQUACY.

Where land in which a bankrupt owned an undivided four-fifths interest was appraised at $6,000, and the bankrupt's interest was sold for $4,600, the price was not so inadequate as to entitle the bankrupt to have the sale set aside.

5. SAME—DUTY OF TRUSTEES—CONTINUANCE OF SUIT.

Prior to a bankrupt's adjudication, she had contracted to exchange certain land free from incumbrances for 40 city lots. When the bankruptcy adjudication was made, the bankrupt's land was incumbered by a mortgage for $12,000 and a judgment lien for the services of an attorney. The owner of the lots refused to make the exchange, and the bankrupt had sued him to compel specific performance, in which he had answered that he owned more than the 40 lots in question, and that the contract did not specify which 40 he was to convey. *Held* that, a demurrer to such defense having been overruled, the trustees properly refused to prosecute the suit further.

6. SAME—SALES—ACCEPTANCE OF BID.

When certain of the bankrupt's real estate was offered for sale, she offered to bid $10,500, but, being unable to deposit $1,000 earnest money or pay the amount of her bid, the auctioneer did not receive or cry her bid, and finally sold the property to another for $10,354. *Held*, that such sale was properly confirmed nearly a month thereafter; the bankrupt having taken no steps in the meantime to make good her bid.

Petitions to Review Orders of the District Court of the United States for the Eastern Division of the Southern District of Ohio, in Bankruptcy.

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John Logan, for petitioner.
W. G. Hyde, for respondent.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. On January 7, 1904, Margaret Alice Throckmorton was adjudicated a bankrupt, and on January 27, 1904, Samuel T. Ruggles, Samuel W. Courtwright, and John Schleyer were appointed trustees of her estate. The principal property owned by the bankrupt was a farm in Pickaway county, Ohio, appraised at $17,000, free of dower, a farm in Ross county, Ohio, appraised at $10,500, subject to dower and homestead, after the homestead had been assigned, and six parcels of real estate in Connecticut, appraised at $30,287.50, free of dower. The farms in Pickaway and Ross counties, Ohio, and one parcel of the real estate in Connecticut, have been sold. Each step taken by the trustees in the administration and disposition of this property has been assailed by the bankrupt, first before the referee, and then before the court below, and vigorous efforts have been made to have the trustees removed. Numerous petitions have been laid before us to review the orders of the court below sustaining the referee and the refusals of the court below to remove the trustees. In this connection, we have been urged, not only to consider questions of law not arising out of any facts either found or conceded, but also questions of fact involved in the finding or order sought to be reviewed. Obviously our jurisdiction is restricted to matters of law, and the legal questions we can examine are only those which arise out of the facts found or conceded. In re Taft, 68 C. C. A. 385, 133 Fed. 511; First Nat. Bank v. Title & Trust Co., 198 U. S. 280, 291, 25 Sup. Ct. 693, 49 L. Ed. 1051. Bearing this in mind, we shall take up the matters sought to be presented so far as they seem to merit consideration.

1. At the time of the adjudication, January 7, 1904, the farm in Pickaway county was being advertised for sale upon an order issued by the common pleas court of that county. It was purchased at the sheriff's sale by a Mr. Foresman. Pending the action of the court on the report of the sale, Foresman leased the farm to one William Cross for $1,200 for a year, from March 1, 1904, to March 1, 1905. The sale by the sheriff was not confirmed, and the land was finally sold by the trustees on December 5, 1904. Upon the appointment of the trustees, Foresman turned over to them the note for $1,200 for the year's rent, and they ratified the lease to Cross. Cross paid the note and was permitted by the trustees to raise and harvest a crop on the farm. On November 17, 1904, before the crop was harvested, the bankrupt filed a petition setting forth the lease to Cross, averring that the crop was of the value of $8,000, that the farm had been advertised for sale without the crop by the trustees, and asking that they be ordered to retake possession of the farm, take possession of the crop, and stop the sale until this should be done. It was charged that there was fraud and collusion between the trustees and Foresman and Cross. The matter came before the lower court, first on a demurrer to the petition, which was sustained, and then, as the record shows, on a consideration of the facts; the entry being:

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"On consideration of the allegations of the petition, the facts shown by the record of said proceedings, the statements of the counsel for said parties, and facts relating to said petition and its allegations, within the knowledge of the court and by the court, the court doth find the allegations of said petition not true, and doth dismiss said petition."

There is nothing for us to review in this order. If the petition contained any facts entitling the petitioners to the relief sought, and we agree with the court below that it did not, we must conclude from the entry that the court below found them to be untrue. We have no power to review its action in that regard. Upon the merits, so far as the facts appear, we think the trustees did the proper and prudent thing in renting the farm to Cross under the circumstances. If they had not, there would have been no crop raised and no rent paid.

2. Prior to 1898, the Connecticut land, consisting of six tracts or parcels, belonged to John I. Throckmorton, the husband of the bankrupt. He took advantage of the bankrupt act in 1899, but on March 5, 1898, through one Bacon Wakeman, a member of the bar at Bridgeport, Conn., he conveyed the undivided four-fifths of this real estate to his wife, Margaret Alice Throckmorton. On March 12, 1898, the two, John I. Throckmorton and Margaret Alice Throckmorton, gave a mortgage on the real estate to the Bridgeport Savings Bank for $12,000. On March 24, 1898, Bacon Wakeman, claiming that John I. Throckmorton was indebted to him for legal services, sued out an attachment upon John I. Throckmorton's remaining interest in the land. It is out of this attachment, and the subsequent legal proceedings to enforce it, that the next question arises.

On November 29, 1901, Wakeman recovered a judgment against John I. Throckmorton for $827.69, to be satisfied only out of the interest Throckmorton had at the time of the attachment in the real estate. On February 20, 1903, Wakeman began an action in the court of common pleas of Fairfield county, Conn., to foreclose his judgment lien on the premises attached, and on March 10, 1904, a judgment of foreclosure was entered, after a hearing upon the answers of John I. Throckmorton and the bankrupt. The bankrupt was given until July 5, 1904, and John I. Throckmorton until July 7, 1904, to redeem the premises. But they did nothing. When the trustees attempted on December 14, 1904, to sell the Connecticut land, they found Wakeman insisting that by a strict foreclosure of his judgment lien he had secured title to the undivided one-fifth interest which John I. Throckmorton owned at the time of the attachment. As a result, while one of the tracts was sold at the first sale, a matter we shall refer to hereafter in another connection, the order of sale was subsequently modified so as to authorize the trustees to offer, not the whole, but only the undivided four-fifths interest, in the land. This modification was based upon the finding of the referee that Wakeman by his strict foreclosure had secured the one-fifth interest in the real estate.

This order, the recognition of Wakeman's interest on which it was based, and the action of the trustees in giving it effect, are vigorously assailed. The main assault is naturally made upon the decision of the Supreme Court of Errors of Connecticut, in the case of Wakeman v. Throckmorton, 74 Conn. 616, 51 Atl. 554, decided March 5, 1902.



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A learned argument has been made designed to show that the highest court of Connecticut erred in deciding this case in favor of Wakeman. We are not disposed, under the circumstances, to enter into a discussion of the Connecticut law regulating the taking and foreclosure of liens of this character upon real estate in that state. It is enough to say that it appears in the case mentioned that the Connecticut courts had jurisdiction of the parties and the subject-matter of the action, and that the highest court in that state, in a well-considered opinion, decided the controversy in favor of the validity of Wakeman's claim. We have no authority in a collateral proceeding to set at naught this adjudication. We approve of the action of the court below sustaining the referee's recognition of Wakeman's interest in the Connecticut land, and find no cause to criticise the trustees for pursuing the course they did with reference to it.

3. At the sale on December 14, 1904, the so-called "first tract" of the Connecticut land was sold to D. Fairchild Wheeler at his bid of $4,600. This sale was set aside by the referee, but the court below, upon a petition for review, reversed the referee and confirmed the sale for a four-fifths interest in the tract; that being all the trustees could sell in view of Wakeman's interest. We are now asked to review and reverse the court. We question whether, in this connection, there is any matter here for review; but, if there were, we would not interfere with the discretion exercised by the court below. The tract was appraised at $6,000, and four-fifths of it sold for $4,600. This was not a bad sale as such sales go, and it does not appear that any better offer has been made.

4. Prior to the adjudication, Margaret Alice Throckmorton entered into a contract to exchange the first tract of the Connecticut land to Benjamin Monnett, of Columbus, Ohio, for 40 of the lots the latter had laid out in a suburb of that place. The contract provided that she should convey the Connecticut land in fee simple, free of incumbrance, and that Monnett should secure her a loan of $8,000 on the Columbus lots. When she became a bankrupt, this land was incumbered by a mortgage of $12,000 to the Bridgeport Savings Bank and by the judgment lien of Wakeman. Before this Monnett refused to make the exchange, and she had sued him to compel a specific performance. This suit was pending when the trustees were appointed. Monnett's answer set up three defenses; the third being that he owned more than 40 lots, and the contract did not specify which forty he was to convey. A demurrer to this defense was overruled. Afterwards the trustees declined to prosecute the suit further, because they did not believe they could successfully maintain it. We think in this they did right. Even if the contract could have been made certain, so as to ascertain which 40 lots Monnett had agreed to convey, still the Connecticut tract was incumbered to such an extent, not only by the $12,000 mortgage to the Bridgeport Savings Bank, but also by the recognized claim of Wakeman to an undivided one-fifth interest, that it was impracticable for the trustees to comply with the terms of the contract on the part of the bankrupt. At any rate, under all the circumstances, they should have been allowed some discretion, and the decision they reached met with the approval of the court below.

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5. When the Ross county farm was offered for sale the second time, the bankrupt offered to bid $10,500 for it. She did not at that time have the money to comply with the terms of the sale, by either making the deposit required by the trustees of $1,000 earnest money, or by paying the amount she bid. The auctioneer, not deeming her responsible, did not receive or cry her bid, and the property was knocked down to Milton S. Bartholomew for $10,354. This was on the 18th of September, 1905. The sale was reported on the 21st of September. On the 7th of October the referee confirmed the sale to Bartholomew, finding that neither at the time of the sale, nor since, had the bankrupt been able to comply with the terms of the sale and make her bid good. We are at a loss to comprehend what reason can be given for reversing the action of the referee or that of the court in sustaining it. The referee gave the bankrupt every opportunity to make her bid good, and it was only when she failed to do so that the sale to Bartholomew was confirmed.

6. The action of the court below in declining to remove the trustees meets with our hearty approval. The charges against them do not merit discussion.

The orders and judgment of the lower court are affirmed.

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(149 Fed. 149.)

## ROBINSON et al. v. BRAST et al.

(Circuit Court of Appeals, Fourth Circuit. November 8, 1906.)

No. 656.

EQUITY—JURISDICTION—DETERMINING LEGAL RIGHTS ON CROSS-BILL.

A bill in equity was filed by the lessors in an oil lease against the lessee for a discovery and an accounting with respect to royalties reserved by the lease, and for a specific performance of the contract as to delivery of such royalty oil. The defendant answered, and also filed a cross-bill, in which it insisted on its rights under the lease, and alleged that certain other persons who were made defendants thereto claimed ownership of portions of the land, and prayed that their rights be determined by the court. Such defendants appeared, and with the consent of all parties all questions raised by the pleadings were referred to a master who made findings with respect to the title to the lands, which were confirmed by the court and a decree entered. *Held*, that the bill filed by the original defendant was not a bill of interpleader, but a cross-bill in aid of its answer, setting up matters necessary to be determined as preliminary to a decision on the original bill, and which as such the court had jurisdiction to determine, and that all parties having submitted their rights to such determination were bound by the decree, even if it did declare legal rights.

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg.

Dave D. Johnson, for appellants Robinson and Smith.

V. B. Archer, for appellant John Stephens.

Thomas P. Jacobs and R. E. Horner (S. Bruce Hall, on the briefs), for appellees.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

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GOFF, Circuit Judge. From the decree of the court below, entered on the 23d day of August, 1905, this appeal has been sued out. The appellees A. E. Brast and M. A. Brast were complainants in the original bill filed in this controversy on the 31st day of January, 1896, and the appellee the South Penn Oil Company was the sole defendant thereto, the object of which was to enforce the provisions of a contract, and to compel an accounting. Said complainants, claiming to be the owners in fee of a certain tract of 640 acres of land situated in the Northern District of West Virginia, on the 2d day of July, 1892, leased the same for oil and gas purposes to Ira De Witte, who assigned and transferred the lease to the South Penn Oil Company, which company entered upon the land, developed the same, produced oil therefrom, and delivered it to the pipe line company for transportation, as was provided for in the lease. The complainants, who also claimed title to another tract of 347 acres of land, adjoining the one so mentioned, on the 23d of July, 1894, leased the same to the South Penn Oil Company, and that company, proceeding with development, produced oil therefrom and delivered it to the pipe line company. Complainants claimed that they were entitled to one-eighth of the oil as royalty, and that they were also entitled, by usage as well as by law, to a division order from said oil company, by which the oil so delivered to the Pipe Line Company could have been apportioned preparatory to its sale. It was alleged in the bill that the South Penn Oil Company refused to deliver the oil from some of the wells it had drilled on the land, and that it declined to execute a proper division order concerning it. Because of such refusal, and of complainants' inability to discover the quantity of oil that had been produced, and also because of the inadequacy of the remedies provided by law, the bill in equity was filed, by which a discovery, an accounting, and a specific performance was asked for. In March, 1896, the South Penn Oil Company demurred to the bill, on consideration of which the court overruled the same, and appointed a receiver to take charge of the royalty oil. The answer of the South Penn Oil Company was then filed, in which it was set forth that the land, or the portion of it on which the wells were located, belonged to John Blackshere, Charles E. Wells, N. S. Beatty, A. N. Pritchard, and A. W. Pritchard, and that said complainants did not have title thereto, and that therefore some of the royalty oil had not been delivered to them.

The South Penn Oil Company afterwards, in April, 1897, filed in said proceeding its bill, in effect a cross-bill, to which the original complainants and a number of persons who claimed title to different parts of the land included in the leases mentioned were made defendants. It was set out in said bill that the South Penn Oil Company was willing to deliver the oil due under the leases to those justly entitled to the same, and the court was asked to determine as between the various claimants to which of them the royalty oil should be given. A further history of the title to said lands and of the various conflicting claims connected therewith is not deemed essential to the proper disposition of this appeal. It will be sufficient to state that on motion the causes were consolidated, that answers were duly filed, and the case regularly matured for hearing; that the court below by decree disposed of many of

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the questions at issue, to the satisfaction of the parties in interest, other than the appellants; that it then appearing there were still conflicting claims to the residue of the oil in the hands of the receiver, and to the land mentioned in the pleadings, the case was referred to a master in chancery, with directions that he report what lands claimed by the defendants to the bill of the South Penn Oil Company were included in the leases made by A. E. and M. A. Brast, the titles of such defendants to the separate tracts of land by them claimed, what amount of the oil had been produced from each of said tracts, and the royalty due to each, and the owner thereof, the quantity of oil in the possession of the receiver, and also a description and the location of each well, together with a special report on any matter required by any party in interest. The master was required to have the evidence taken down in shorthand, transcribed, and returned with his report, and a surveyor was appointed to do such surveying and make such plats as the master might direct, or any party to the litigation should require.

The master, after due notice to all of the parties, proceeded to execute said order of reference, heard all of the evidence offered, examined the title papers submitted by the various claimants, had the necessary surveying and platting made, formulated, and returned his report, together with the evidence, exhibits and his findings. Much time was given by the master, by the attorneys of the various claimants, by the receiver, and by the surveyor, to the investigation and the report made under the decree referred to, and the court, after carefully examining the exceptions taken thereto, by many of the parties in interest, including the appellants, made and entered the decree now complained of.

The assignments of error, many in number, are, when considered in connection with the pleadings and the evidence, unusually technical and absolutely devoid of merit. They relate to the jurisdiction of the court below, and to the method of procedure therein under the rules of equity practice.

The demurrer to the original bill was properly overruled. The case made by it was clearly of equitable cognizance, involving not only specific performance, but a discovery and an accounting. Equity jurisdiction in such cases is elementary; the authorities in support thereof suggesting themselves as the question is presented. But it is insisted, that granting the jurisdiction as to the original bill, nevertheless the court below did not have jurisdiction of the questions raised, nor of the defendants to the bill filed by the South Penn Oil Company. It is called by counsel for appellants a bill of "interpleader," and after they so designate it they suggest that it should not be entertained because the complainant, instead of being a mere stakeholder, was interested in the subject-matter and claimed a decree in its favor. But why should we discuss in connection with this case the technical and elementary questions involved in a bill of interpleader, when a glance at the record submitted for our consideration shows that it was not filed as such a bill, was not so regarded by the parties, nor so treated by the court? The fact that parties claiming an interest in the lands in controversy are called on to produce their titles, and the evidence at their command to sustain their claims—in other words, to interplead concerning those

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matters—does not make it technically a bill of interpleader, especially when it is disclosed by the bill itself that the complainant claims the exclusive right to develop and operate the lands in controversy, by virtue of the leases mentioned; refers to the original bill filed by A. E. and M. A. Brast, and insists that it cannot be properly disposed of until other parties interested in the issues involved in it are before the court; prays that the bills be heard together; and asks that the interests of the complainant therein, who was defendant to the original bill, be protected as to the royalty oil in controversy.

This bill was really filed as a cross-bill, in aid of the answer of the sole original defendant, and it contained all of the elements of such a bill. Concede that it contained other features, and it does not follow that thereby it was deprived of the virtue that it clearly had, and that because thereof the court was prevented from decreeing concerning the matters set out by it directly bearing upon the questions presented by the original bill. It is quite clear that the South Penn Oil Company could not have made good the defense set up in its answer to the original bill, except by bringing in other parties, which it did by the bill now under consideration. While it is true that by its bill the South Penn Oil Company prayed that the defendants be required to interplead, so that the question of title might be determined before the royalty oil was delivered, still at the same time it set up and claimed its own interests in and to said leases, and made it quite apparent that it was not filing what in equity practice is called a bill of interpleader. The court below, as well as counsel, including those now representing the appellants, regarded it as a cross-bill, and in all of the subsequent proceedings it was so treated. It was duly answered as a cross-bill by the defendants thereto, and, while an order of consolidation with the first bill filed was afterwards entered, such procedure was unnecessary, and was clearly an inadvertence, which will not now be construed to the prejudice of any of the parties, all of whom acquiesced in such action, and in the decree referring the cause to a master before whom they appeared with their proofs, and concerning whose report they stipulated that it should be accepted by them as conclusive of their respective titles and rights, subject to such exceptions as they might in due time file to it. This court must look at the bills, pleadings, and proceedings had in the cause in the light the record presents them in, and not in that technical manner that the exigencies of the situation confronting the appellants may suggest to them. It would be inequitable, cause great loss, unusual delay, and much confusion, to now change the character of the proceedings had in this litigation, proceedings taken in the court below with the assent of those now complaining. It was the intention of all the parties to avoid a multiplicity of suits, to completely determine their respective rights, and to secure full and final relief to all connected with the subject-matter set forth in both the original and the cross-bills. It was the endeavor of the court below to proceed in the manner desired by those in interest, and in so doing we are unable to find error. The court had acquired jurisdiction of the cause upon well-established equitable grounds, and in its proceedings and adjudications, in order to properly dispose of the controversy involved, even if it established legal rights and decreed legal

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remedies, it did not go beyond the scope of its authority. In the course of the litigation the chancellor deemed it proper, for the purpose of aiding him in reaching a just conclusion, to refer the cause to a master, a right that was clearly his, and a discretion that he wisely exercised. He was not bound by the master's report, for he could have ignored it, but, after considering all the exceptions to it, he confirmed it and decreed accordingly, a conclusion in which this court fully concurs. He could have directed an issue out of chancery had he thought best, but he would not have been controlled by the verdict of the jury, had it not commended itself to his conscience. As a chancellor, the court below, having jurisdiction of the original cause, could have disposed of both legal and equitable questions, if such disposition had been found necessary to the proper determination of the issues raised by the pleadings.

The assignments of error embrace other points, but they are without force, and as they are in effect included in the observations already given they are not specifically referred to.

There was no decree against the appellant Robinson, and as to her the appeal was improvidently allowed. The errors assigned by appellants Smith and Stephens are without merit, and the decree appealed from is affirmed.

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(149 Fed. 127.)

## VAN ZANDT v. HANOVER NAT. BANK.

(Circuit Court of Appeals, Second Circuit. October 11, 1906.)

No. 247.

1. BANKS AND BANKING—LIEN OF BANK—SPECIAL DEPOSIT OF SECURITIES.

A bank has no general lien on securities deposited with it for a special purpose.

2. SAME—CONSTRUCTION OF AGREEMENT FOR LIEN.

Defendant bank prepared and took a contract, signed by a correspondent bank, by which the latter agreed that "all bills of exchange, notes, * * * money, and property of every kind owned by the undersigned, * * * deposited with the said bank or under its control, as collateral security for loans or advances already made or hereafter to be made, to or for account of the undersigned, by said bank or otherwise," might be held by it as security for any and all indebtedness of the correspondent. *Held*, that such contract applied only to security or property deposited with defendant as collateral security, the words "or otherwise" having reference to the nature of the liability for which the collateral should remain as security, and not to the manner in which it came into defendant's possession, and that it did not give defendant a lien on notes sent it by the correspondent for discount and credit, but which it declined to discount, to secure an overdraft unintentionally made by the correspondent in the expectation that the notes would be discounted and the proceeds placed to its credit.

3. CONTRACTS—RULES OF CONSTRUCTION.

An instrument is to be most strictly construed against the party who prepared it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 736.]

4. SET-OFF AND COUNTERCLAIM—TROVER AND CONVERSION.

A defendant cannot plead an indebtedness of plaintiff as a set-off or counterclaim in an action at law for conversion in a federal court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Set-Off and Counterclaim, §§ 17, 18.]

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In Error to the Circuit Court of the United States for the Southern District of New York.

Writ of error by the plaintiff in the court below to review a judgment for the defendant entered upon a verdict directed by the court.

E. B. Whitney, for plaintiff in error.

P. S. Dudley, for defendant in error.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

WALLACE, Circuit Judge. The question whether the plaintiff (as receiver of the American National Bank of Abilene), or the defendant, was entitled to the possession of the four promissory notes which came to the hands of the defendant in January, 1905, depends upon the following facts: The defendant had been for some time the New York correspondent of the Abilene bank, and the Abilene bank had kept with the defendant a deposit account, making deposits and withdrawing them by checks, bills of exchange, etc. From time to time it forwarded notes or commercial paper made by various persons and owned by itself, indorsing said paper, and offering it to the defendant for sale with a request that in case the defendant purchased the paper the proceeds thereof should be deposited in the deposit account. November 27, 1903, the Abilene bank signed a written contract of hypothecation by which it agreed with the defendant—

"That all bills of exchange, notes, * * * money, and property of every kind owned by the undersigned * * * deposited with the said bank, or which may be in any wise in said bank, or under its control, as collateral security for loans or advances already made, or hereafter to be made, to or for account of the undersigned, by said bank, or otherwise, may be held, collected, and retained by said bank until all liabilities present or future of the undersigned * * * of every kind of said bank, now or hereafter contracted, shall be paid and fully satisfied."

In January, 1905, the four notes in controversy, made by third persons and indorsed by the Abilene bank, payable, three of them, respectively, in 90, 60, and 30 days, and one of them in 6 months, were forwarded by it from Abilene, Tex., to the defendant, by mail, with instructions: "We hand you for discount and credit." The defendant received two of them January 14th, and two of them January 16th, and immediately notified the Abilene bank, by telegrams and letters, that the paper was not satisfactory. After the first two notes had been mailed to the defendant, but before it had received notice of the defendant's refusal to discount them, the Abilene bank drew a check upon the defendant for $3,825.45. This check was paid by the defendant January 17th, resulting in an overdraft of the account of the Abilene bank of about $3,500. Thereupon the defendant, without consulting the Abilene bank, credited the account of that bank with $3,500, and notified the latter by mail that it had made a "temporary loan" of that amount "against collateral in our hands." Before this letter reached Abilene by the ordinary course of mail the Abilene bank had failed, and the plaintiff had been appointed its receiver by the Comptroller of the Currency.

Upon these facts it is plain that the plaintiff was entitled to recover unless the terms of the contract of November 27th authorized the de-

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fendant to treat the notes as a security in its hands for an overdraft or indebtedness by the Abilene bank. In the absence of a contract of that purport, it would have been the duty of the defendant, upon receiving the notes and concluding not to discount them, to return them to the Abilene bank or hold them awaiting further instructions and subject to the disposition of that bank. The Abilene bank had not asked for a temporary loan, and was entitled to have its notes used as it had directed, so as to realize their full proceeds; and if not so used, it was entitled to make such disposition of the notes as it saw fit. As the notes had been sent to the defendant for a specific use, they did not become subject to a general banker's lien. Such a lien does not attach upon securities which are deposited with the banker for a special purpose. Armstrong v. Chemical National Bank (C. C.) 41 Fed. 234, 6 L. R. A. 226; Brandao v. Barnett, 12 Cl. & Fin. 787; Reynes v. Dumont, 130 U. S. 354, 9 Sup. Ct. 486, 32 L. Ed. 934; Wyckoff v. Anthony, 90 N. Y. 442.

The language of the agreement of November 27th is susceptible of different interpretations. It may be read as follows:

"That all * * * notes * * * owned by the undersigned, * * * deposited with said bank * * * or which may be in any wise in said bank or under its control, as collateral security * * * or otherwise, * * * may be held, collected, and retained by said bank."

Read in this way, it is capable of being construed as a pledge of all notes belonging to the Abilene bank that may in any way come into the hands of the defendant, even though they come accidently or against the will of the Abilene bank. But such a reading omits a material part of the instrument, and when that is supplied the instrument reads that all notes "deposited with said bank * * * or under its control, as collateral security for loans or advances already made, or hereafter to be made, to or for account of the undersigned by said bank, or otherwise, may be held," collected, etc. With these words supplied, the words "or otherwise" may be read as referring to the nature of the liability for which the collateral is security, and as meaning to pledge the collateral, not only for loans and advances, but also for any liabilities otherwise arising, such, for instance, as that of an indorser or surety upon the commercial paper of third persons. If the agreement had been intended to pledge all securities belonging to the Abilene bank that might come in any manner to the hands of the defendant, or even of all that might rightfully come to its hands, that intention could have been manifested unmistakably, and in very simple terms, by omitting the words "deposited" and "as collateral security," etc. The latter are descriptive words which identify the securities which the defendant may hold and collect by reference to the purposes for which they come into his hands. If the contention for the defendant in error is correct, these words were used unnecessarily.

"The language of a contract is always presumed to be used with reference to the matter in the minds of the parties when they contract. Therefore words of broad signification will be interpreted with reference to the subject matter of the contract, unless the intention is clear that they should be taken in the broad meaning." Jones, Construction of Contracts, § 220. The parties here were contracting with reference

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to notes, property, etc., which should be deposited by the Abilene bank with the defendant, or should come under its control as collateral security for certain obligations and liabilities, and the general words "or otherwise" should be held to relate to notes and property which should come to the hands of the defendant by way of deposit or collateral security, or some other kind of bailment.

It is apparent, from the fact that the Abilene bank is not named in the instrument, otherwise than as "the undersigned," that it was one for general use prepared by the defendant. Such instruments are always to be construed most strictly against the party by whom they have been prepared. This rule was applied to an instrument like the present one in Gillet v. Bank of America, 160 N. Y. 549, 55 N. E. 292. It is not to be inferred, in the absence of clear terms, that the Abilene bank intended to authorize the defendant to keep and collect such of its notes or property as it did not intend to part with, or such as might be obtained by the defendant without its consent.

The notes in controversy were never deposited by the Abilene bank with defendant, nor did they come into its hands as collateral security within the commonly accepted meaning of these terms. They were temporarily in the hands of the defendant under an option to purchase them. We conclude that they did not come within the terms of the pledge, and that the defendant did not obtain a lien upon them.

If the check drawn by the Abilene bank upon the defendant, which caused the overdraft of its account, had been drawn with knowledge of the defendant's refusal to discount the notes, a different question would be presented; but it is fair to assume that this check was drawn in the expectation that before its presentation the notes would have been discounted and the proceeds credited to the Abilene bank.

The contention for the defendant in error that it was entitled to set off or counterclaim the indebtedness owing to it by the Abilene bank when the latter became insolvent is wholly untenable. Such a defense is not available in an action at law for conversion, and, if the defendant had any right of equitable set-off, this should have been asserted by a bill in equity.

The assignment of error based upon the ruling directing a verdict for the defendant seems to be well taken, and accordingly the judgment is reversed.

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(149 Fed. 130.)

## ROCKEFELLER v. WEDGE.

(Circuit Court of Appeals, Third Circuit. December 11, 1906.)

No. 43.

1. TRIAL—VERDICT—JURY—INTERROGATION.

Where several issues are submitted to a jury and a general verdict returned, the court may interrogate the jurors to specialize the verdict and state on which issue or issues it is based.

2. APPEAL—REVIEW—HARMLESS ERROR—SUBMISSION OF ISSUES—PREJUDICE.

Where, in an action on a note, the jury found in plaintiff's favor on an issue as to alleged misrepresentations, plaintiffs sustained no injury by the submission of such issue to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, § 4212.]

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3. BILLS AND NOTES—RELEASE—CONSIDERATION.

The defendant, having a good position with the Standard Oil Company, at Bayonne, N. J., was induced by the plaintiff to undertake the management of a zinc mine for him in Missouri, in which the plaintiff was largely interested, being promised a salary of $7,500 and an interest in the mining company, for which he gave plaintiff the note in suit for $15,050, with the stock of the company as collateral. The plaintiff being also interested in a cattle company at Kansas City, and its affairs becoming involved, and a receiver being necessary, the defendant subsequently at his request accepted the position and performed its duties for a number of months, being put under great mental and physical strain in consequence, and also subjected to possible pecuniary liability on his bond, by which he might lose all his property. Wishing to give up the position, he was urged by the plaintiff as a personal favor to continue, which he did. Later on there was a crisis in the affairs of the cattle company, and a large sum of money was necessary to enable the plaintiff, who had guarantied some $2,000,000 of its obligations, to maintain himself, which money the defendant secured by a personal appeal to the plaintiff's brother, who was a man of affluence in New York. Feeling, however, that his position was insecure, the defendant while on this trip obtained another, at a good salary, with a company in Pittsburg; but upon his return, at the earnest solicitation of the plaintiff and his counsel, was led to give it up and keep on with the cattle company, the plaintiff guarantying and paying the salary which had been promised him from the mining company, but which had been stopped, to which payment, however, the defendant contributed the compensation allowed him by the court as receiver, amounting to $3,800. A few months later the zinc mine was sold at a serious loss; the defendant's interest being made practically worthless. About this time, in a casual interview in a street car, the plaintiff, who had several times before expressed his willingness to give up the defendant's note, saying that he did not wish him to lose anything by the venture, declared to the defendant that he might consider the note discharged; the services which he had rendered to the plaintiff and the sacrifices that he had made to do so being referred to and assigned as the reason. The note, however, was not given up, the plaintiff explaining that it might prejudice him with others, whose notes for similar interests he held and whom he proposed to sue. *Held*, in a subsequent suit by the plaintiff on the note, that there was sufficient consideration for the promise to release, which was set up, and that a verdict for the defendant should be sustained.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Francis Rawle and B. P. Finley, for plaintiff in error.

Charles B. Downs and W. Findlay Brown, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and ARCHBALD, District Judge.

ARCHBALD, District Judge. This was a suit on a promissory note for $15,050, given by the defendant to the plaintiff for an interest in a zinc mining company. The defense set up was, first, that the note was obtained by misrepresentation, and, second, that before it became due the plaintiff agreed to cancel it. Both issues were submitted to the jury, who found for the defendant; but in response to an inquiry by the court, at the time the verdict was rendered, it was put entirely upon the second ground.

Complaint is made that there was no evidence of misrepresentation, and that it was error to let that question go to the jury; the plaintiff

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being prejudiced, even though they found in his favor. The practice of calling on jurors to specialize their verdict in the way that was done is furthermore deprecated, and the right of the court to do so is challenged. But the right to interrogate a jury, and to act upon their findings, is directly sustained in Walker v. Southern Pacific R. R., 165 U. S. 593, 597, 17 Sup. Ct. 421, 41 L. Ed. 837, and City of Elizabeth v. Fitzgerald, 114 Fed. 547, 52 C. C. A. 321, and does not need to be vindicated here. And, far from being open to the criticism made of it, if it were oftener resorted to, it would save not a few mistrials; many rulings to which objection could otherwise be justly made being eliminated and rendered harmless. Clementsen on Special Verdicts, 95, 286; 4 Mich. Law Rev. 493. While, then, in the present instance it may have been error to submit to the jury the question of misrepresentation in obtaining the note, and as matters go in the jury room it may, perhaps, not have helped the plaintiff to do so, in legal contemplation it did him no injury; and, the jury having found in his favor upon that issue, it is out of the case as completely as if it never had been there.

The real question is whether there was any consideration for the promise to release the note, which is relied upon. The facts which bear upon this are not seriously disputed. In November, 1900, the plaintiff, having taken an option on a zinc mine in Missouri which he proposed to develop, wrote to the defendant, who was in the employ of the Standard Oil Company at Bayonne, N. J., and had had considerable general business experience, to come out and take charge of it, offering him a salary of $7,500 per annum, where he was getting but $6,000, as well as a substantial interest in the enterprise, for which he agreed to take a three-year note, with the stock of the company which was to be formed as collateral. The relations of the parties for a number of years had been of the most friendly and intimate character, very much, indeed, like that of father and son; the defendant, who started as a stenographer, having risen by the plaintiff's influence to a responsible and remunerative position. Moved by a sense of personal obligation, as well as by the inducements held out to him, the defendant accordingly gave up his place in the East and assumed the management of the business. The venture, however, was not a success, and the defendant was only a short time engaged with it, at least directly. The plaintiff became involved in other matters, in which he needed his assistance, and the active management of it was therefore given up after a few months; the property being eventually sold out to other parties in December following at a heavy sacrifice. The diversion from the mining business was due to a crisis in the affairs of a cattle company at Kansas City, in which the plaintiff was even more largely interested. A receivership was necessary to extricate it, and, the plaintiff having no confidence in those with whom he was associated, the position was pressed upon the defendant, who assumed it in May, 1901, continuing in it up to the middle of October. The duties which devolved upon him in that connection were of the most arduous and exacting character, and, combined with the personal loss entailed by the failure of the zinc mine, the strain upon him, physically and mentally, was so great that early in July he

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almost reached the point of a nervous breakdown. His salary from the mine was also cut off, and the prospect of getting anything out of the receivership was problematical, and would not in any event be realized until it was brought to an end. Money to run the cattle business, moreover, was lacking, and he was falling behind in his accounts to such an extent that liability on his bond was possible, imperiling all his property. The situation seemed desperate, and he wrote the plaintiff to be relieved from it, but was urged to stay on, which he consented to do as a matter of personal favor. No material improvement, however, followed, at least not immediately; and the affairs of the cattle company reached such a crisis in September that, unless relief was speedily obtained, the plaintiff, who had guarantied some $2,000,000 of its obligations, might not be able to maintain himself. The immediate amount needed to tide things over was $86,000, and the defendant suggested that the plaintiff's brothers, William and John D. Rockefeller, men of the largest affluence, should be appealed to. The trouble was that the plaintiff was not on good terms with them, and in addition was himself under such a nervous strain from this and other matters that he was in no condition to go and see them. It was accordingly arranged that, armed with a letter from the plaintiff, the defendant should go to New York and interview Mr. William Rockefeller, which he did with such success that the money was raised and the plaintiff relieved from his embarrassment. Feeling, however, that the situation still was precarious, and that he must look after his own personal interests, the defendant, while away, hunted up and secured a position with a salt company at Pittsburg at a good salary, and upon his return to Kansas City again brought up the question of giving up the receivership. But the plaintiff would not hear to it, and, together with his attorney, labored with the defendant the better part of a day, urging the necessity for his keeping on and the unfairness of his quitting at that time; and, upon the plaintiff promising to take care of the salary due him from the mining company, he agreed to stay, which he did, without further demur, until the receivership was wound up, assisting somewhat, also, again in the management of the zinc company. Not long after this, an offer was made for the zinc property which all parties regarded favorably; the plaintiff being repaid by the sale the cash advances which he had made, and about 10 per cent. being divided around upon the capital, the defendant getting a credit on his note of some $1,500.

This sale was consummated early in December, and soon afterwards, December 17th, while plaintiff and defendant were riding together in a street car, the interview occurred at which, according to the defendant, the note was forgiven him. "You may regard this note as canceled and off the books" is the way it was put; the plaintiff at the same time explaining that he did not surrender it, because he intended to sue certain other parties, who had got him into the enterprise, whose notes for stock he was similarly carrying, and he did not wish to prejudice this. "But your matter," as the defendant was assured, "you may consider disposed of." The plaintiff admits this meeting, and that the subject of the note was brought up, but denies having agreed to release it, and, on the contrary, declares that the defendant wanted him

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to do so, but he refused. At least twice before, however, he had voluntarily made a similar offer, and, while the defendant in each case put it aside at the time, only a few days previously he had written to the plaintiff, expressing a willingness to accept, if he thought proper to renew it, which not unnaturally led up to what is claimed to have followed. Right afterwards, also, December 20th, the defendant wrote again, alluding to the point made by the plaintiff about retaining the note, but calling attention to the fact that the matter would be left in bad shape in case either of them died, and suggesting that something should be given to him to show that the note was eventually to be delivered up or canceled. And, while it is true that the plaintiff did not answer favorably, that does not do away with the corroborative effect of this letter. All this, however, goes only to the probability of the defendant's story, and was for the jury. The question which concerns us now is, whether, assuming the promise, there was anything to stand as a consideration so as to make it binding.

As a mere gratuity, if that was all there was to it—the plaintiff not wishing the defendant to be at a loss, as he expressed it, in the earlier offers—the promise to release would not be enforceable; the gift not having been completed by a surrender. The same is true, also, if the stock which was pledged for the note and was demonstrably worthless, was to be taken and the note canceled, which would be merely another way of putting it. Neither was anything done or omitted by the defendant at the time, so as to furnish an inducement directly moving between the parties, although that is not essential; a past transaction being sufficient, provided it actually enters into the bargain. A consideration, however, is claimed to be found in the services rendered by the defendant, to which reference has been made above, which, fortunately for that contention, according to the testimony of the defendant, were expressly assigned by the plaintiff as the basis of his action. "He said he appreciated very much all I had done for him in connection with the receivership matter," is the statement. "He appreciated the heavy strain on my vitality and strength it had been to go through such an experience, and he appreciated what I had done for him in relation to his brother William and other things that I had done; and for these reasons, and all reasons, I might consider that the note was finally disposed of." As to the character and value of these services there can be no reasonable question; nor that they were performed at the urgent solicitation of the plaintiff, for his own personal benefit, and to the marked inconvenience, if not disadvantage, of the defendant.

It is said, however, that they were fully compensated at the time by the salary which he was to get, which was continued to be paid him, as guarantied by the plaintiff, even after the zinc company had gone out of business. But one of the inducements held out to him to leave his position with the Standard Oil Company was that he was to have an interest in the enterprise, which having failed, his salary did not altogether meet the situation. To its payment, moreover, the defendant himself contributed the $3,800, which he was allowed by the court for his services as receiver, which he turned over, at the suggestion of the plaintiff, to help reimburse the latter for the money advanced to the zinc company, out of which the plaintiff's salary was paid; as

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the result of which, if his services to the company are held to have been met by his salary, it still leaves him uncompensated for what he did as receiver; and, while it may be that the plaintiff, having personally guarantied his salary, was entitled to command his time in the one position or the other, as it suited him, and even though we disregard the contribution to this which the defendant made by giving up what the court had allowed him, which, after all, goes a long way to eliminate it, outside of and beyond all this there were other and extraordinary services which made up a considerable tale, for which he admittedly got nothing. It was no part of his duty as receiver, for instance, to solicit the $86,000 which was secured from the plaintiff's brother. This was undertaken solely in the interest and for the benefit of the plaintiff, to whom it was of the most supreme importance, the personal character of which he recognized by paying the defendant's expenses, and, if so, why not, also, for his services? And when, at the urgency of the plaintiff and his counsel, the defendant agreed to stay on in the receivership, giving up the position which he had secured elsewhere, it was as a sheer matter of favor to the plaintiff, and was in fact so pressed upon him.

The only difficulty is that the acts of the defendant were apparently rendered without expectation of reward, for which neither then nor afterwards was any direct claim ever made. At the same time, they were in no sense voluntary, in view of which, and the assurances given by the plaintiff from time to time, particularly with regard to the note in controversy, the defendant might fairly anticipate that in some way they would eventually be made up to him. It is in the light of and with reference to all this that the promise to release is to be taken. Fifteen thousand dollars is not given away for nothing, nor is it to be explained in the present instance on the score of friendship, particularly as the plaintiff's regard, as he himself says, had begun to decidedly weaken. Based squarely, as it was by the express declaration of the plaintiff, on the extraordinary services which the defendant had rendered, it thus became at the same time a recognition of their value and of the obligation resting upon him to make compensation, an admission which put the defendant in a position to demand something substantial, even if the release set up were not supportable. It was not simply, as before, that the plaintiff did not want to see the defendant lose by the venture. That, also, may have actuated him. But what he proposed, as it was put, was to positively and directly remunerate him, according to what was acknowledged to be his actual due. Conceding, then, as we must, that a consideration for the promise to release, which is relied upon, must appear, and that consisting, as it did, of services already rendered, they must have been of such a character and performed under such circumstances as entitled the defendant, not only to expect, but to enforce, compensation, there is enough, in our judgment, to meet these requirements in what is found here. It may seem dangerous to hold, as we thus apparently do, that a money obligation of this magnitude can be discharged by a casual observation in an informal interview, without anything directly moving between the parties at the time, and with nothing but the say-so of the party released to sustain it. This is not, indeed, the whole case. But, giving full force to the circumstances

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which are thus alluded to, they bear, as already stated, merely on the probabilities, and not on the legal principle involved, with which we are alone concerned at this time, which having been correctly declared at the trial, the judgment is affirmed.

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(148 Fed. 576.)

## ISRAEL v. ISRAEL.

(Circuit Court of Appeals, Third Circuit. October 17, 1906.)

No. 37.

JUDGMENTS—ACTION ON JUDGMENT OF ANOTHER STATE—JUDGMENTS WHICH WILL SUPPORT ACTION.

Under article 4, § 1, of the federal Constitution, requiring that full faith and credit shall be given to the judicial proceedings of another state, in order that a judgment or decree shall be conclusive in an action brought thereon in another state, it must not only be conclusive in the jurisdiction where rendered, but also final in character, and establish a fixed and certain liability; and a decree for alimony and costs will support an action in another state in so far as it is for a sum due at the time of its rendition, and which is absolutely awarded, but not with respect to future payments, for which it provides, but as to which it remains subject to modification at any time, in the discretion of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1496, 1497.]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 136 Fed. 1023.

David Wallerstein, for plaintiff in error.

D. Stuart Robinson, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. This is a writ of error taken by Abraham Israel to reverse a judgment for $2,640.71 and costs recovered against him in the court below by Tillie B. Israel, defendant in error, in an action of assumpsit, founded on a certain judgment or decree for the payment of alimony, maintenance and costs, rendered by the Supreme Court of New York, in a suit for divorce brought by him against her. The plaintiff in the court below introduced in evidence an exemplified copy of the record of the proceedings in the New York suit and rested. The defendant offered no evidence and a verdict for the plaintiff was taken subject to the question reserved "whether there was any evidence to go to the jury in support of plaintiff's claim." This point was determined adversely to the plaintiff in error and judgment was entered on the verdict. The assignments of error broadly raise the question whether the judgment or decree for the payment of

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alimony, maintenance and costs in the New York suit could support the action of assumpsit in the court below. It appears from the record that the New York suit was brought by the plaintiff in error to secure an absolute divorce from the defendant in error, and that, the latter in her answer to the complaint having denied the charges made against her and set up a counterclaim and prayed for a dismissal of the complaint and, by way of affirmative relief, for a separation from bed and board and suitable support and maintenance, it was, July 21, 1902, adjudged and decreed by the court, among other things, as follows:

"Fourth. That the plaintiff pay the defendant weekly on Monday of each and every week commencing on the 30th day of June, 1902, and until the further order or judgment of this court, the sum of thirty dollars for the support and maintenance of defendant and the said children, such payment, however, not to be in lieu of dower or right of dower of the defendant in the plaintiff's real estate or any interest in his personal estate in case of his death intestate.

"Fifth. That the defendant recover from the plaintiff the costs of this action to be adjusted by the clerk of this court."

It appears from the record that the costs of the New York suit were adjusted by the clerk at the sum of $223.85, and were, September 15, 1902, adjudged and decreed to be paid by the plaintiff to the defendant.

The defendant in error contends that by virtue of the Constitution and laws of the United States full faith and credit are to be given in Pennsylvania to the judgment or decree of the Supreme Court of New York, and therefore that the action in the court below was sustainable. The plaintiff in error denies that the Constitution or legislation of the United States so applies to the New York judgment or decree as to support that action. Article 4, section 1, of the Constitution declares that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state," and that "the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." By the act of May 26, 1790, c. 11, 1 Stat. 122, as amended and incorporated in section 905 of the Revised Statutes [U. S. Comp. St. 1901, p. 677] it is provided that the records and judicial proceedings of the courts of any state, when duly authenticated, "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken." It appears from the record that the judgment on the verdict in the court below includes $2,130 representing alimony and maintenance for seventy one weeks, at the rate of $30 per week, as adjudged and decreed in the New York suit, and, further, that of the above sum of $2,130 only $120, or four weeks' alimony and maintenance was payable on the rendition of the New York judgment or decree. The balance, amounting to $2,010, represented alimony and maintenance which was not then payable, but only to accrue thereafter. It appears that under the statutes of New York the judgment or decree, so far as it directed the payment of alimony and maintenance not then accrued or payable could at any time thereafter be annulled, varied or modified by the court rendering it. It, therefore, was not a con-



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clusive and final judgment or decree with respect to the sum of $2,010, representing alimony and maintenance for sixty seven weeks accruing after its rendition. It did not constitute a fixed, unconditional and absolute liability for its payment. Any rule which would allow suit to be maintained in another state on such a judgment or decree for future alimony and maintenance, would directly tend to the creation of confusion, embarrassment and conflict between courts. The Supreme Court of Illinois in Barclay v. Barclay, 184 Ill. 375, well said with respect to the liability to pay alimony which had become due under a decree providing for future alimony:

"The decree for alimony may be changed from time to time by the chancellor, and there may be such circumstances as would authorize the chancellor to even change the amount to be paid by the husband, where he is in arrears in payments required under the decree. * * * The peculiar character of the obligation is such that it is always subject to modification by the court in which the decree was entered, according to the varying circumstances of the parties, and no other court could undertake to administer the relief to which the parties are entitled except that having jurisdiction in the original suit. An attempt to do so by such other court would bring about a conflict of authority and a condition of chaos with reference to questions of this character, because no other court would have before it the facts with reference to such change in conditions and as to such original right of the parties."

In Pennington v. Gibson, 16 How. 65, 14 L. Ed. 847, the court laid it down "as the general rule, that in every instance in which an action of debt can be maintained upon a judgment at law for a sum of money awarded by such judgment, the like action can be maintained upon a decree in equity which is for an ascertained and specific amount," but, in referring to Hugh v. Higgs, 8 Wheat. 697, 5 L. Ed. 719, where it was held that no action at law was sustainable "on the decretal order of the Court of Chancery," said:

"It might very well be error to allow the action of debt upon a decretal order of the chancery, and yet perfectly regular to sustain such an action upon the final decree. The former is subject to revision and modification, the latter is conclusive upon the rights of the parties."

We are well satisfied that, aside from the operation of the constitutional and legislative provisions touching the faith and credit to be given to the records and judicial proceedings of the courts of other states, when duly authenticated, no action was sustainable in Pennsylvania on the New York judgment or decree so far as it embraced alimony and maintenance not then accrued. And we are equally well satisfied that such constitutional and legislative provisions do not lend any support to an action in Pennsylvania for the recovery of such alimony and maintenance. On this point Lynde v. Lynde, 181 U. S. 183, 21 Sup. Ct. 555, 45 L. Ed. 810, is conclusive. In that case the Supreme Court affirmed the decision of the Court of Appeals of New York. Lynde v. Lynde, 162 N. Y. 405, 56 N. E. 979, 48 L. R. A. 679, 76 Am. St. Rep. 332. The case came before the Court of Appeals on appeal from a judgment of the Appellate Division of the Supreme Court of New York modifying and affirming as modified a judgment of the court at Special Term in an action founded on a decree of the Court of Chancery of New Jersey by which it was adjudged that the plaintiff was entitled to recover of the de-

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fendant $7,840 for alimony until the date of the decree, and a counsel fee of $1,000; that the defendant should pay to the plaintiff alimony at the rate of $80 per week from and after the date of the decree and give security for the payment of the several sums of money directed to be paid; and that upon his failure to comply with the decree application might be made for sequestration proceedings and a receiver and an injunction. The trial court at Special Term decided that the decree of the Court of Chancery of New Jersey should be enforced against the defendant not only with respect to the counsel fee of $1,000 and alimony until the date of the decree, but also as to alimony accruing from and after the date of the decree, and the giving of security; and further provided that upon failure by the defendant to comply with the provisions of the decision a receiver might be appointed ancillary to the receiver appointed by the Court of Chancery of New Jersey. The defendant appealed and the Appellate Division modified the judgment, so as to allow the plaintiff to recover $8,840, the aggregate of the counsel fee and alimony until decree, and affirmed the judgment as so modified. The Court of Appeals through Gray, J., among other things, said:

"With respect to how far the Supreme Court of this state will enforce the final decree of the New Jersey court, I think the determination of the Appellate Division to be quite correct. The action was to recover upon a final decree of the court of another state, which, being rendered with jurisdiction over the person of the defendant is to be deemed conclusive, in so far as it adjudged the defendant to be indebted to the plaintiff at the date of its rendition. The proceeding in chancery had terminated in an unconditional decree that the defendant must pay a definite sum of money, established as a debt against him, and, therefore, it had extra-territorial value and force. (Wharton Confl. Laws, § 804.) As a debt of record against the defendant the courts of this state should give it full credit and effect; but as to its other provisions for future alimony and for equitable remedies to enforce compliance, I do not think we should say that it falls within the rule of the Federal Constitution. I do not think that the courts of this state should give effect to the decree by enforcing any of the collateral remedies, which the prevailing party may be entitled to in New Jersey and which the subsequent order gave to her. So far as it made provision for the payment of alimony in the future, it remained subject to the discretion of the chancellor and lacked conclusiveness of character. The chancellor's action was not final on the subject. As he observed in Lynde v. Lynde (supra), referring to the law of New Jersey: 'The statute exhibits an intention that the subject shall be continuously dealt with according to the varying condition and circumstances of the party.' The provision of the Federal Constitution, which requires that full faith and credit shall be given to the judicial proceedings of another state, in my opinion, should be deemed to relate to judgments, or decrees, which not only are conclusive in the jurisdiction where rendered, but which are final in their nature. If they, once and for all, establish a debt, or other obligation, against a party, the record is available in other jurisdictions as a foundation for a judgment there."

The Supreme Court of the United States in its affirming opinion said, through Mr. Justice Gray:

"By the Constitution and the act of Congress, requiring the faith and credit to be given to a judgment of the court of another State, that it has in the State where it was rendered, it was long ago declared by this court: 'The judgment is made a debt of record, not examinable upon its merits; but it does not carry with it, into another state, the efficacy of a judgment upon property or persons to be enforced by execution. To give it the force of a judgment in

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**another State, it must be made a judgment there; and can only be executed in the latter as its laws may permit.' * * * The decree of the Court of Chancery of New Jersey, on which this suit is brought, provides, first, for the payment of $7,840 for alimony already due, and $1,000 counsel fee; second, for the payment of alimony since the date of the decree at the rate of $80 per week; and third, for the giving of a bond to secure the payment of these sums, and, on default of payment or of giving bond, for leave to apply for a writ of sequestration or a receiver and injunction. The decree for the payment of $8,840 was for a fixed sum already due, and the judgment of the court below was properly restricted to that. The provision for the payment of alimony in the future was subject to the discretion of the Court of Chancery of New Jersey, which might at any time alter it, and was not a final judgment for a fixed sum. The provisions for bond, sequestration, receiver and injunction, being in the nature of execution, and not of judgment, could have no extra-territorial operation."**

The defendant in error relies on Barber v. Barber, 21 How. 582, 16 L. Ed. 226. That case, however, was reviewed at considerable length by the Court of Appeals of New York in its opinion in Lynde v. Lynde, supra; and it cannot reasonably be assumed that, when the latter case was under consideration by the Supreme Court of the United States on writ of error, Barber v. Barber was overlooked by that tribunal. On the contrary, it fairly may be assumed that the Supreme Court took the same view as the Court of Appeals did of the decision in Barber v. Barber. In so far as that decision is inconsistent with Lynde v. Lynde on the point now under discussion, if there be any inconsistency, it must be considered as overruled, or at least modified, by the later case. We regard Harding v. Harding, 198 U. S. 317, 25 Sup. Ct. 679, 49 L. Ed. 1066, cited on behalf of the defendant in error as wholly inapplicable to the matter in hand. We think that neither principle nor authority warranted the bringing of any action in Pennsylvania on the New York judgment or decree so far as it provided for the payment of alimony and maintenance to accrue thereafter, and that there was error on the part of the court below in rendering the judgment complained of on the question reserved. But the New York judgment or decree, with respect to the alimony and maintenance due and payable on its rendition and the costs, represents a fixed, unconditional and absolute liability for which suit might be maintained elsewhere than in New York in any court of competent jurisdiction. The defendant in error sued in the court below for the recovery not only of the amount of such fixed liability, but also of the alimony and maintenance to accrue only after the rendition of the New York judgment or decree, together with interest on the several sums. We have no reason to believe or even suspect that in thus suing she attempted or meditated any fraud upon the jurisdiction of the court below, founded upon the amount of the matter in dispute. It is but reasonable to assume that her claim as set forth in her declaration or complaint fairly represented the amount really and bona fide in controversy so far as she is concerned, and, therefore to conclude that the court below had jurisdiction. Schunk v. Moline, Milburn & Stoddart Co., 147 U. S. 500, 13 Sup. Ct. 416, 37 L. Ed. 255. The judgment below included not only $2,010 representing alimony and maintenance accruing after the rendition of the New York judgment or decree but also legal interest thereon to the date of taking the ver-

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dict on which the judgment below was entered; that sum with such interest amounting to $2,258.90. The plaintiff below had no right to recover any portion of the future alimony and maintenance or interest thereon, represented by the sum last above mentioned, and the excess of the amount of the judgment over that sum being "less than the sum or value of five hundred dollars exclusive of interest," she was not entitled to recover costs in the action below. Rev. St. § 968 [U. S. Comp. St. 1901, p. 702].

In view of the foregoing considerations we are of opinion that, unless the plaintiff below or her proper representative shall within thirty days next after the date of filing this opinion enter upon the record of the judgment below a remittitur as to the sum of $2,258.90, parcel of the amount thereof, together with legal interest on that sum, and as to all costs in the action below, and shall within the same period of thirty days file in this court a certified copy of the remittitur so entered upon the record below, the judgment below should, at the expiration of that period, be reversed with costs both in this court and in the court below; but that upon the entry upon the record of the judgment below by the plaintiff or her proper representative within the above mentioned period of thirty days of such remittitur and the filing within that period of a certified copy thereof in this court, as above mentioned, the judgment below should stand and be affirmed as to the residue of the amount thereof, the plaintiff below, defendant in error, however, to pay costs in this court. And it is now so ordered and adjudged, and that the mandate of this court issue upon the expiration of the above mentioned period of thirty days, and, further, that the clerk of this court do forthwith transmit to the parties or their counsel of record certified copies of this opinion and order.

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(148 Fed. 585.)

## TRADE DOLLAR CONSOL. MINING CO. v. FRASER et al.

(Circuit Court of Appeals, Ninth Circuit. October 8, 1906.)

No. 1,305.

1. WATERS AND WATER COURSES—RIGHTS OF APPROPRIATOR—PROTECTION BY INJUNCTION.

A complainant corporation, which has made an appropriation of water from a stream in accordance with the laws of a state to be used in the generation of power for manufacturing and electrical purposes, and which has constructed a dam at large expense sufficient in height to enable it to use beneficially the quantity of water appropriated, is entitled to protection by injunction against a later appropriator, who for the purpose of obtaining the benefit of the dam is undertaking to take out ditches or canals a short distance above it, to be carried below around the ends of the dam, also for the purpose of generating power, where the effect would

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be, not only by lowering the water to lessen the power and efficiency of complainant's plant, but also to endanger its dam by the proximity of the proposed ditches.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 331, 332.]

2. INJUNCTION—PROTECTION OF WATER RIGHTS—PROOF OF THREATENED INJURY.

Where defendants had filed an application for a permit to divert water from a stream which had been granted by the state authorities on their furnishing a plan of their proposed works, which plan if carried out would work irreparable injury to the plant of complainant, which was a prior appropriator, and defendants insisted upon their right and affirmed their intention to proceed in accordance with such plans, such facts sufficiently show a purpose and intention to interfere with complainant's water rights to warrant the granting of an injunction to restrain the threatened injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 9–13.]

3. SAME—ADEQUATE REMEDY AT LAW.

The fact that defendants, who claim the right to take water from a stream in accordance with plans approved by the state authorities, in carrying out such plans would be compelled to condemn right of way over the lands of complainant, who is a prior appropriator, will not debar complainant from the right to an injunction to restrain the building of such proposed works, where their construction would work irreparable injury to the plant of complainant and destroy the value of its prior water right, since its equitable rights could not be adequately protected in the condemnation proceeding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 15–17.]

Appeal from the Circuit Court of the United States for the Central Division of the District of Idaho.

Johnson & Johnson and N. M. Ruick, for appellant.

Alfred A. Fraser, for appellees.

Before GILBERT and ROSS, Circuit Judges, and DE HAVEN, District Judge.

ROSS, Circuit Judge. The case shows that one Joseph H. Hutchinson, the predecessor in interest of the appellant, by notice posted and recorded in January, 1900, claimed the right to the use of 10,000 cubic feet per second of the waters of Snake river, to be diverted therefrom at a point about 10 miles up the river from the town of Guffey, Owyhee county, Idaho, particularly identified by a large lava rock island near the center of the river, and which point is called Swan Falls. The purpose for which the appropriation was made was stated in the notice to be "power for motive, manufacturing, mechanical, electric light, electric power, and other useful and beneficial purposes, and for irrigation by means of pumping and otherwise." The notice further stated that the water was to be diverted by means of a dam, or else two canals or conduits, said dam to be constructed across the river at Swan Falls, particularly describing the dam site, and further stating that the water flowing at that point was "to be used for power for motive, manufacturing, mechanical, electric light, electric power and for pumping water for irrigation purposes in the counties of Ada, Canyon, Owyhee, Elmore, Lincoln, Cassia and other places in Idaho"; that plans and speci-

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fications of the dam site would be filed with the state engineer of Idaho as required by law, and claiming five years in which to complete the dam or canals. In May following Hutchinson posted and caused to be recorded in the office of the recorder of the county another similar notice of the appropriation of the same waters for the same purposes, to be diverted at the same place, and that such diversion was to be by means of a dam, plans and specifications of which would be filed with the state engineer of Idaho, and designating the places of intended use, and further expressly stating that nothing therein was intended as a waiver of any rights claimed in his previous notice of January.

The appellant, a corporation organized and existing under and pursuant to the laws of the state of Kentucky, having acquired Hutchinson's rights, commenced and completed the construction of a dam across the river at the point indicated in the notice, plans for which were approved by the state engineer as required by a statute of the state, thereby creating a head of 19 feet of water, and installing a costly power plant not only of great present capacity but one intended to be, and susceptible of being, largely increased. While at the time of the commencement of this suit, and at the time of its trial in the court below, the appellant was only making use of 2,150 cubic feet per second of the waters of the river in the operation of its plant and the running of the four water wheels it had then installed, the undisputed evidence shows that in the construction of the dam provision was made for the installation of 12 more wheels of like capacity, the operation of which would require practically all of the water claimed. The evidence also shows that the cost of the works already completed exceeds $350,000, and that in the making of that large expenditure the appellant not only had in view additions to the equipment from time to time as the demand for power and the other purposes stated should arise, in the development of the region in which the plant is located, but had been actively engaged in the pursuit of its intention to enlarge the plant and apply all of the water claimed to a beneficial use.

A statute of the state of Idaho, where the property in question is situated, approved March 11, 1903 (Sess. Laws 1903, pp. 250–252), makes provision for just such a case. Sections 38 and 41 of that statute are as follows:

"Sec. 38. In allotting the waters of any stream by the district court according to the rights and priorities of those using such waters, such allotment shall be made to the use to which such water is beneficially applied, and when such water is used for irrigation the right confirmed by such decree or allotment shall be appurtenant to and shall become a part of the land which is irrigated by such water. Such right shall pass with the conveyance of such land and such decree shall prescribe the land to which such water shall become so appurtenant; and the amount of water so allotted shall never be in excess of the amount used for beneficial purposes for which such right is claimed; provided, that in the case of works capable of diverting more water than is applied to a beneficial purpose at the time the rights of the person or persons owning or using such works are adjudicated by the court, the right only to the water beneficially applied at the time of making such allotment shall be confirmed by the court, and the court shall ascertain the amount of water which can be diverted through such works in excess of such quantity beneficially applied, and shall set a time when such an amount shall be applied to the beneficial purposes for which it is intended, which time shall not exceed

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**four years from the date of the decree issued by such court under such adjudication, and any person using any of such water which was not beneficially applied at the time of such adjudication shall, before the expiration of the time set for such beneficial application, make proof of such beneficial use in the manner provided in section seven (7) of this act, and such right, when confirmed in the manner provided in this act, shall relate to the priority established by such court, and if such application of any of such water shall be made subsequent to such date then the priority of the right to the use thereof shall be determined in the manner provided in section eight (8) of this act."**

**"Sec. 41. All rights to divert and use the waters of this state for beneficial purposes shall hereafter be acquired and confirmed under the provisions of this act; and after the passage of this act all of the waters of this state shall be controlled and administered in the manner herein provided, and all acts or parts of which may be in conflict with this act are hereby repealed."**

The case further shows that at the low-water stage of the river, which extends from August to November of each year, the volume of water flowing in the river at Swan Falls is only about 6,500 cubic feet per second. On the west side of the river is Owyhee county, and on the east side is Ada county, of the state of Idaho. After the building of appellant's dam and the consequent raising and backing of its waters until a head of 19 feet was thereby obtained, the defendants and one F. B. Whitin filed in the office of the engineer of the state, pursuant to the provisions of a statute of the state, two applications for permission to appropriate certain waters of the river for power purposes—one for a permit to appropriate 2,000 cubic feet per second to be diverted from the river at a point on the west bank thereof in Owyhee county, about 500 feet above the west end of the appellant's dam, and to be conducted to the point of intended use on the same bank of the river about 500 feet below the west end of the dam, by means of a ditch or canal 65 feet in width at the bottom, 81 feet in width at the water line, and with a depth of water of 8 feet; the other for a permit to appropriate 2,000 cubic feet per second to be diverted from the river on the other bank thereof in Ada county, about 400 feet above the east end of the appellant's dam, and to be conducted to the point of intended use on the same bank of the river about 500 feet below the east end of the dam, by means of a ditch or canal of like dimensions, and with like depth of water. Whitin having conveyed all of his interest in the applications and permits to the defendant Fraser, and the state engineer having returned both applications to the defendants for the purpose of correction, and having required a more definite and certain place of diversion and use of the waters and a survey of the proposed ditches or canals to be used in connection therewith, the defendants, on the 29th of November, 1904, returned to the state engineer their corrected applications, each accompanied by a plan and map of the proposed works for the diversion of the waters, on which day the state engineer approved each application and granted them a permit to appropriate the waters applied for, and to construct the proposed works, subject to the limitations and conditions that one-fifth of the work therein specified should be completed on or before May 29, 1907, that the whole of such work be completed on or before November 29, 1909, and that the time for the proof of the beneficial use of such waters extend to November 29, 1913. Those permits, with the maps and plans accompanying the same, were record-

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ed in the records in the office of the state engineer. We assume that that officer was authorized to grant the permits to the defendants if they did not interfere with any vested right of the appellant. If they did so interfere, then, manifestly, to the extent of such interference they were and are invalid and of no effect.

Since the applications of the defendants and accompanying plans and maps show that the point of diversion of the waters applied for are but a few hundred feet above the appellant's dam, and the place of their intended use but a few hundred feet below it, and as the defendants' declared purpose of use is that of power, nothing can be plainer than that their sole object in so fixing the points of intended diversion was and is to avail themselves of the power created by the appellant's dam. If such use of the waters of the river would be without injury or damage to the appellant, perhaps it could not justly complain, but the record before us leaves no room to doubt that such diversion by the defendants would certainly work serious damage to the appellant and very likely destroy its dam. There is no conflict in the testimony upon the subject; indeed, it is all one way. We extract from the testimony of the witness Wiley, under whose directions appellant's works were constructed. Being asked to state what effect the defendants' diversion of the waters covered by their permits would have upon the appellant's dam and power plant, the witness answered:

"A. The construction of a canal around the south end of the dam would, in my opinion, result eventually in its destruction.

"Q. State your reasons for that conclusion.

"A. At this end of the dam the bed rock does not rise above the level of the old bed of the river, and is overlaid by a mixture of boulders and fine earth to which the dam is joined as securely as possible under such conditions; and the defendants' plans show a very large canal in this unstable material, carrying a flow of 5,000 cubic feet of water per second around the abutment of the dam, so close as to be practically in contact with it. Such a canal would be extremely hard to maintain, and a break in it would result in rapid erosion and the establishment of a new channel for the river around the south end of the dam, lowering the water to somewhere nearer its original level. Such a canal would also act as an effective barrier to any repairs that it might be necessary to make to the dam, and in this way also would be a constant menace. The dam in the south channel is of the rock-filled crib type and is filled and backed by material taken from the side hill adjacent to the south abutment, which is the only place where suitable material is available. It is necessary to have free access to this material in order to maintain the dam, and a quarry filled with cars and derrick is maintained here for this purpose, and has been used every year since the completion of the dam. The construction of the proposed canal would prevent the use of this quarry and will isolate the dam from all material needed in its maintenance. The proposed canal around the north end of the dam would be a menace to the safety of the dam, though not such a serious one as that around the south end; the material in the north shore being of a firmer nature, though even here we were not able to make a complete junction with the bed rock. The chief objection to the canal at this end is the obstacle it would present to the operation of the present plant and its prohibition of future extensions. The property of the company is located in a narrow canyon 700 feet below the general level of the country. There is barely room on the north side of the river for the location of the dwellings necessary for the employés of the company in the operation of its plant, and a canal with the proposed capacity of 5,000 cubic feet per second, as shown by defendants' map, would take away practically all the available ground in the vicinity of the complainant's property. Furthermore, the construction of both canals, as

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proposed by the defendants, would leave the property of the complainant isolated from the mainland by canals which are virtually rivers themselves, and would be a most serious obstacle in the maintenance and operation of the plant.

"Q. What other effect would the diversion of the amount of water claimed by the defendants, through canals at each end of the complainant's dam, have upon the present power dam of the complainant?

"A. The diversion around the south end of the dam would only result in reducing the head acting upon the water wheels by the lowering of the water above the dam; but the diversion around the north end, on account of the condition of the river below, would result in not only reducing the elevation of the water above the dam, but would raise the elevation of the tail-water. The combined effect would reduce the velocity of the water wheels to such an extent as to render the entire equipment of water wheels, gearing, and electric generators inadequate for the work required, and it would be necessary to install a new equipment to meet the new conditions. Furthermore, the reduced head would require more expensive machinery to produce the same results, and would also require the use of a much larger volume of water.

"Q. What, in your opinion, has been the effect of the defendants' application for a permit to divert the water around the complainant's dam, upon the value of complainant's property?

"By Mr. Fraser: I object to that as immaterial, irrelevant, and incompetent. The witness has not shown himself competent to testify as to that question, and it is calling for a conclusion of the witness.

"A. It has, in my judgment, materially decreased the value of complainant's property by suggesting a flaw in complainant's title and making it difficult, if not impossible, to perfect plans for the extension of the plant, while there exists a possibility of defendants' right to divert any part of the water around complainant's dam."

The witness Irwin, who it appears is the general manager of the complainant company, after specifying the various mines and companies and towns and parties to which the complainant furnishes power and light, and the various steps that have been taken by the complainant to enlarge its plant and extend its operations, being asked to state what effect the construction of defendants' proposed works would have on the dam and power plant of the complainant, answered:

"A. I think the construction of a canal on the Owyhee county side would menace the property so seriously in my opinion that it would practically destroy it.

"Q. Give your reasons.

"A. My reasons for this are that the lava reef on which this dam rests does not run at right angles to the original course of the stream, and consequently the waters coming over the spillway are forced against the Owyhee county bank, and this causes a very strong eddy to be formed on that side of the river. This eddy has a tendancy to erode the bank back of the abutment and has already done so. In June, 1903, I received a telephone message from the superintendent in charge of the power plant that the fill back of this abutment was washing, and that it was necessary to take some immediate steps to protect the dam. I took a shift from the tunnel, and by special conveyance hurried them to the dam, and there found that this water or eddy had washed the riprap and fill back of the abutment on the Owyhee county side a distance of about four feet, and was still washing it at that time. We tried to fill this hole which the eddy had cut, and found that up to a distance of about 16 feet from the pier we could fill it, but from there on nothing would stay. We had this crew of men put in one rock that was practically five feet square, but it dropped into that hole and was lost to sight and apparently had no effect whatever. The erosive action of the water was finally stopped at that point by putting in rails and holding the water that way.

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"By Mr. Nugent: Q. Steel rails?

"A. Well, track rails. This, of course, was merely a temporary expedient. It was adopted to keep the water from washing around this abutment. As soon as low water came in the fall, we proceeded to put in timber cribs below this abutment and had them filled with rock, and we thought we had the situation well under control. But in 1904, at the high-water stage, a telephone message from the power plant again summoned us to the river, as this time the riprap work above the pier was being cut out and one of the bulkheads in the crib, which was put in the preceding summer, had been practically cut out and the rock settled through it. We took a crew of men and had them working probably for two weeks repairing the damage that the high water was doing at that time. Up above the dam on the Owyhee county side there is one place where you can see a sink hole probably five feet in diameter, through which the water at the medium stage of the river runs. Where it runs to we don't know, but we were afraid of it, and this year we are having that excavated and a crib filled with rock and dirt built above the dam to afford additional protection at this point. The fact that the concrete masonry is not joined to rock on the Owyhee county side, but is simply tied to the boulders and loose ground there, makes it a very difficult point to hold; and, from the force of the water that I have witnessed and had a little experience with in handling, these two sets of difficulties that we have had during the high-water period have convinced me that, no matter whether all the men you could get and all the money that you could have back of you was available, nothing would prevent the destruction of that dam, if the water at high-water season cut around the south pier.

"Q. What would be the effect of the construction of such a canal as is contemplated by the defendants?

"By Mr. Fraser: I object to that for the reason that the defendant has not shown himself competent to answer the question.

"A. It would cut us off from the quarry that we use in getting the fill to make these repairs that we use in the high-water season, and would, in my opinion, be very apt to cause erosion there that would practically give the river a new channel around that south pier. It would practically destroy the dam.

"Q. From your knowledge of the circumstances there and the condition of the soil, could such canal be safely constructed?

"A. I don't think it could. On the north side of the dam the principal damage would be the lowering of the head and cutting our power house off from the mainland. In addition to this the tail-water at this side would necessarily raise on account of the islands which lie directly below on the Ada county or north side of the river, which would have a tendency to back the water up and raise the tail-water as well as decreasing the efficiency of the machines."

There is no contradiction of this testimony in the record, but, on the contrary, other evidence therein in confirmation of it. In the opinion of the court below it is caid:

"There is one proposition involved in this case which seems clear. The complainant has erected a dam across that river, by which it creates a waterfall of 19 feet where practically none before existed, and thereby it has created a power for its plant. This 19-foot fall exists only while the dam is filled to the top, and, of course, any decrease in the height of the water lessens the power and efficiency of the plant accordingly. The complainant is entitled to such protection of this dam that the water in it shall not be lowered below the 19 feet by the erection of any other works by any other parties."

But the court below held that, inasmuch as, in its opinion, there was not a sufficient showing of an intention on the part of the defendants to divert the water claimed by them, the complainant was not entitled to any injunction.

We agree with the court below that the appellant is entitled to maintain the head of water created by the dam, for the reason that it was,

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as against the defendants, the prior appropriator, and because the undisputed evidence shows that any decrease in the height of the water must necessarily lessen the power and efficiency of the appellant's plant. But there is another reason, equally potent, why the defendants are not entitled to make the diversion of the waters claimed by them in pursuance of the permits granted to them. The uncontradicted evidence clearly shows that the diversion of the waters claimed by the defendants by means of the contemplated canals and ditches, in such close proximity to the appellant's dam, would not only seriously endanger its security, but very likely work its destruction. That fact of itself would necessarily work irreparable injury to the appellant, for the uncertainty in respect to the stability of the appellant's works and the continuing danger of their destruction would not only necessarily depreciate the value of them, but practically put an end to the appellant's contemplated enlargement and extension of its plant. We therefore entertain no doubt that the appellant is entitled to an injunction protecting it against the diversion of the waters claimed by the defendants in pursuance of the permits granted to them by the state of Idaho, if the case sufficiently shows the purpose of the defendants to commit the wrongs complained of. The court below was of the opinion that it did not, relying in its opinion upon what is said in section 198 of Kerr on Injunctions, and upon this quotation from the opinion of the court in the case of Church v. Maschop, 10 N. J. Eq. 57:

"The court cannot grant an injunction to allay the fears and apprehensions of individuals. They must show the court that the acts against which they ask for protection are not only threatened, but will in all probability be committed to their injury."

The section from Kerr on Injunctions is as follows:

"The mere prospect or apprehension of injury, or the mere belief that the act complained of may or will be done, is not sufficient; but, if an intention to do the act complained of can be shown to exist, or if a man insists on his right to do, or begins to do, or threatens to do, or gives notice of his intention to do, an act which must, in the opinion of the court, if completed, give a ground of action, there is a foundation for the exercise of the jurisdiction. The mere denial of a man of his intention to do an act or to infringe a right will not prevent the court from interfering; but, if a man asserts positively that it is not his intenion to do a certain act or infringe a certain right, and there is no evidence to show any intention on his part to do the act or infringe the right, the court will not interfere."

We find no fault with the law as thus declared, but are of the opinion that the record in the present case not only shows the intention on the part of the defendants to commit the acts complained of, but that even in their answer they do not make any unqualified denial of such intention. The bill charges that the defendants, against the complainant's will and in violation of its rights, threaten and intend to commence the construction of the canals of the dimensions indicated in the permits issued to them, and in accordance with the plans annexed thereto, for the purpose of diverting 2,000 cubic feet of the waters of the river around each end of the complainant's dam. In their answer the defendants do not make any unqualified denial of such intention and purpose on their part, but aver:

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"That they and their predecessors in interest, in securing the permits referred to in the complainant's bill, and which are relied upon by these defendants for their rights and privileges in the premises, acted in good faith and with the sole object and purpose of acquiring the right to use the unappropriated waters of Snake river at said point to the extent of 4,000 cubic feet and of maturing plans for power plant and financing said proposition so as to conduct said power to Boise City and other places for sale for mechanical, lighting, and other purposes. These defendants aver that so far these defendants have proceeded no farther than to comply with the laws of the state of Idaho with reference to securing said permits from the state engineer, which permits have been duly and regularly granted; that said defendants do not purpose or intend to go upon said ground of the complainant or attempt to construct said canals or in any manner interfere with said premises until they have filed their suit in condemnation for a right of way for its said canal and the right to use said property, which will not be done for some four or five months, as defendants are now engaged in matters connected with the said business solely, aside from the work upon the ground such as financing said proposition, which matters are now well advanced; that in all matters relative to defendants' rights they intend to proceed by legal methods and in an orderly way, and will not in any event attempt work upon said ground or attempt to divert said water, or to initiate the construction of said canals until permitted so to do by a court having jurisdiction of matters relative to proceedings in condemnation, and will proceed alone in accordance with the laws and statutes of this state relative to acquiring rights by condemnation. Defendants allege that they do not intend to trespass upon said premises or in any way interfere with the complainant's free and uninterrupted use of said waters until their rights have been determined."

Inasmuch as the condemnation proceedings here referred to are for the rights of way for the canals indicated on the plans annexed to the permits, it appears from the defendants' own answer that they intend to commit the acts complained of, and insist upon their right to do so. These threatened acts of the defendants would, according to the evidence, necessarily lessen the efficiency of the complainant's plant, be continuing in their nature, and be very likely to absolutely destroy its dam, and as a consequence its entire plant. An injunction lies to restrain threatened permanent interference with water rights (Angel on Water Courses, § 444 et seq.), and, whenever there is a threat and intent to wrongfully enter upon another's real property and to take permanent possession thereof and effect a permanent lodgment there, the threatened injury is "irreparable in itself, and the insolvency of the intruder or the actual damage which may ensue is immaterial." More v. Massini, 32 Cal. 595; Richards v. Dower, 64 Cal. 62, 28 Pac. 113; Crescent City Wharf & Lighter Co. v. A. M. Simpson, 77 Cal. 290, 19 Pac. 426. Although it appears that the appellant is the owner of the lands through which the defendants propose to build their canals, and therefore would necessarily be the party defendant to such condemnation proceedings, it is manifest that its equitable rights could not be there fully protected, if protected at all. Where such is the case, it is well settled that a remedy afforded by an action at law is no bar to the maintenance of a suit in equity. Kilbourne v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. Ed. 1005; Boyce v. Grundy, 3 Pet. 210, 7 L. Ed. 655; Southern Pacific Railroad Co. v. U. S., 133 Fed. 651, 66 C. C. A. 581, and cases there cited.

Our conclusion is that the appellant is entitled to an injunction restraining the defendants from making the diversions of the waters

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covered by the permits issued to them at the points or through the ditches or canals indicated on the plans accompanying them, and from any diversion of the waters of the river that will interfere with the head of water created by the appellant's dam, or in any way injure or destroy its works.

We are further of the opinion that the court below should, in accordance with the provisions of the statute of Idaho above quoted, have by its decree fixed, within the limits of the appellant's appropriation, the amount of water which can be diverted by its works, and should have fixed a time not exceeding four years from the date of the decree within which the remainder of the water covered by the appellant's appropriation, not already applied to beneficial use, should be so applied. That such, in the opinion of the court below, was the appellant's right under the statute of Idaho appears from this clause of its opinion:

"Beyond question, under our laws, a party may be protected in the use of all the water he actually appropriates and uses, even if it be every drop that flows in as great a river as the Snake. Not only that, but when he has used but a part of what he claims, he will be allowed a reasonable time to make use of the balance, provided he shows by his work and improvements good faith in reducing all he claims to his actual use."

In the opinion of the court below there is no indication of any lack of good faith on the part of the appellant, nor do we discover any in the evidence. Yet the court below refused to award appellant the relief contemplated by the provisions of the statute above quoted, and confined the relief given to the quieting of the appellant's title, as against the claims of the defendants, to the 2,150 cubic feet per second of the waters of the river already applied by it to a beneficial use.

For the reasons stated, the judgment is reversed, and the cause remanded to the court below for further proceedings in accordance with views above expressed.

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(148 Fed. 968.)

## KNUDSEN-FERGUSON FRUIT CO. v. MICHIGAN CENT. R. CO.

(Circuit Court of Appeals, Eighth Circuit. November 5, 1906.)

No. 2,378.

1. CARRIERS—RAILROADS ENGAGED IN INTERSTATE COMMERCE—SCHEDULE OF RATES.

Semble, that a railroad company engaged in interstate commerce in its schedules of rates and classifications filed with the Interstate Commerce Commission pursuant to Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3156], may state separately its rate for the carriage of ordinary commodities of a particular class and its charge for icing cars when commodities of the same class are of a character requiring to be shipped under refrigeration, and that its collection of both charges when refrigeration is used is lawful, provided they are each reasonable and do not cover double compensation for the same service.

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2. SAME—ACTION FOR DAMAGES BY SHIPPER—GROUNDS OF RECOVERY.

To support an action by a shipper against a carrier under section 8 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 382 [U. S. Comp. St. 1901, p. 3159]), he must show either that there has been some unreasonable or excessive charge imposed or some unlawful discrimination practiced against him by which he has been pecuniarily damaged, and he cannot recover, on a merely technical construction of the law, because, in addition to the ordinary scheduled rate, an extra charge for icing service, also shown by the schedules, but separately, has been collected from him, where such charge is not shown to be unreasonable and has not been so held by the Interstate Commerce Commission.

In Error to the Circuit Court of the United States for the District of Minnesota.

The fruit company sued the Michigan Central Railroad Company to recover the sum of $27 claimed to have been unlawfully exacted for the icing of a car load of grapes shipped from Matawan, Mich., to Duluth, Minn., and the further sum of $500 as a reasonable attorney's fee. The grapes were transported over the Michigan Central Railroad from Matawan to Chicago, and thence over the Chicago, Milwaukee & St. Paul Railroad to Duluth. It was charged in the complaint that the railroad companies had duly filed their joint schedules of rates with the Interstate Commerce Commission, as required by the act to regulate commerce approved February 4, 1887 (Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3156]), and the acts amendatory thereof, and that the rate specified in the schedules was 48 cents per 100 pounds of grapes for receiving, handling, transporting, caring for in transit, and safely delivering, when transported in car load lots, from Matawan, Mich., to Duluth, Minn., and that this rate purported to cover all charges of every kind and description, and that there was nothing in the schedules indicating an additional charge for icing in transit; that the defendant company entered upon the bill of lading as advance charges its proportion of the published through rate, and in addition thereto the sum of $27 for the icing of the car in which the grapes were shipped, and that when the car reached its destination at Duluth the plaintiff paid the entire amount of charges, but that the item in controversy was paid under protest and duress. It was further charged in the complaint that the exaction of the charge for icing or refrigeration was collected without warrant of law and contrary to the provisions of the acts to regulate commerce, and, further, that it was unjust and unreasonable. There were received in evidence at the trial copies of the documents filed with the Interstate Commerce Commission as required by the act of Congress. One was a schedule of class rates which showed the through rate from Matawan to Duluth for second-class freight to be 48 cents per 100 pounds. This schedule contained a reference to the official classification. The latter, also filed with the commission, rated grapes in car load lots as second-class, and it contained an express provision that grapes and certain other fruits mentioned, not forwarded in pick-up cars, would be subject to an additional charge for icing at a minimum rate of $2.50 per ton of 2,000 pounds, fractions of a ton proportionately. Another contained special rulings affecting rates and official classification, and among them was a provision that the regular transportation rate did not include the charge for icing, and that for the latter service there would be imposed a minimum charge, upon shipments of grapes and other fruits, of $2.50 per ton, fractions proportionately. There was also a supplement to the sheet of special rulings which provided that "the rates herein named are subject to the weights, rules, conditions, and special instructions of the official classification," etc. All of these documents were connected together by appropriate references. It apeared from the evidence that by a general arrangement with the defendant company the refrigerator car in which the grapes were shipped was furnished and the icing done by another corporation, known as the "Armour Car Lines," and that the latter received from the defendant the charge for icing, which was billed as an advance charge and collected from the plaintiff by the connecting carrier at Duluth. The arrangement with the Armour Car Lines was such that no other refrigerator cars than those

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**belonging to it could be used in that traffic, and no one else could perform the icing service. At the conclusion of the evidence the trial court directed a verdict for the defendant, and, judgment being rendered accordingly, the plaintiff prosecuted this proceeding in error.**

Roger S. Powell, for plaintiff in error.

C. A. Severance (Frank B. Kellogg and Robert E. Olds, on the brief), for defendant in error.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It should be observed at the outset that, although the plaintiff charged to the contrary in its complaint, the schedules published and on file with the Interstate Commerce Commission clearly showed that the specified rate for transportation of the grapes did not include, and was not intended to include, any charge for the icing of the car in transit. As shown by those schedules, there was a separate and distinct charge for icing in addition to the transportation rate. There was no proof at the trial that the charge collected for icing the refrigerator car in which the grapes were shipped was not a just and reasonable one for that particular service; nor proof that the freight rate from the point of shipment in Michigan to the destination in Minnesota which was charged and collected was not a just and reasonable rate for the transportation of the grapes, considering that service as separate and apart from the icing of the car. In other words, there was no proof that the sums of money exacted of and paid by the plaintiff were unjust and unreasonable charges for the services performed, whether regarded separately or in the aggregate. Again, there was no proof that the amounts demanded by the defendant and paid by the plaintiff were in excess of the rates and charges separately specified in the schedules filed with the commission; nor was it claimed that the railroad company was guilty of discrimination against the plaintiff by the performance for others of like and contemporaneous services for a less compensation.

We will assume, without considering the question, that the payment of the charge imposed for the icing of plaintiff's car of grapes was made under such circumstances as would entitle it to recover, did it otherwise have a cause of action, although in a case quite similar the Circuit Court of Appeals of the Seventh Circuit held that a payment by the same plaintiff was voluntarily made and that therefore there could be no recovery. Knudsen-Ferguson Fruit Company v. Railway Company, 79 C. C. A. 483, 149 Fed. 973.

The plaintiff contends in effect that at common law it is the duty of a common carrier to provide adequate and suitable facilities for the transaction of the business in which it is engaged; that its duty of transportation comprises, not only the reception, the carriage, and the delivery of the property intrusted to it, but also that measure of protection and care during transit which its known characteristics demand; that when it holds itself out as a carrier of perishable commod-

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ities, that can only be moved in refrigerator cars and under refrigeration, and invites and accepts traffic of that character, its duty keeps pace with the necessities of the business, and it must not only furnish suitable cars, but also the refrigeration of the same during transit; that, although the carrier leases the equipment or contracts with another corporation to furnish it and perform the incidental service, no new or independent element is injected into the relation between the shipper and the carrier that affects or impairs the full responsibility of the latter; that a charge for the necessary icing of a refrigerator car in which a perishable commodity is transported is a charge imposed for a service which it is the duty of the carrier to perform as part of its duty of transportation.

With the foregoing as a premise, the plaintiff further contends, in effect, that under the act to regulate commerce, approved February 4, 1887, and the amendments thereof, a transportation rate is single and indivisible, and embraces compensation for services of every kind and character that a railroad company is required to perform as a necessary incident to its contract of carriage, and that it was therefore unlawful for the defendant and its connecting carrier to segregate the rate and to specify in the tariff schedules a charge for the icing of refrigerator cars separately from the ordinary rate of transportation for second class freight from Matawan, Mich., to Duluth, Minn. It may well be admitted that, if a railroad company promulgates a rate which justly and reasonably compensates for the entire service it is required to perform, it cannot exact additional compensation by also naming one of the services which is an essential and integral part of its duty of transportation and affixing to it a distinct and separate rate. But assuming, without deciding, that a railroad company may be required to furnish ice for refrigerator cars and to maintain refrigeration during transit, it is not clear that a reasonable charge for that service may not be scheduled separately from the rate for ordinary transportation, provided, of course, no part of one is covered in the other.

Section 6 of the act of February 4, 1887, provides:

"That every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its route. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force and shall also state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges."

Provision is also made for the establishment of joint tariffs over continuous lines or routes operated by more than one carrier and the filing of the same with the commission, and that:

"It shall be unlawful for any common carrier, party to any joint tariff, to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of persons or property or for any services in connection therewith between any points as to which a joint rate, fare or charge is named thereon, than is specified in the schedule filed with the commission in force at the time."



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It is also provided that:

"The commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged and may change the form from time to time as shall be found expedient."

It at least seems to have been recognized by Congress that there may properly be rules or regulations which in some wise change, affect, or determine a part or the aggregate of the scheduled rates and charges, and there is nothing in the act clearly indicating that the rate or charge for every service must be included in one specified sum. It is true that in Covington Stockyards Co. v. Keith, 139 U. S. 128, 135, 11 Sup. Ct. 461, 463, 35 L. Ed. 73, the court said:

"A carrier of live stock has no more right to make a special charge for merely receiving or merely delivering such stock, in and through stockyards provided by itself, in order that it may properly receive and load, or unload and deliver, such stock, than a carrier of passengers may make a special charge for the use of its passenger depot by passengers when proceeding to or coming from its trains, or than a carrier may charge the shipper for the use of its general freight depot in merely delivering his goods for shipment, or the consignee of such goods for its use in merely receiving them there within a reasonable time after they are unloaded from the cars. If the carrier may not make such special charges in respect to stockyards which itself owns, maintains, or controls, it cannot invest another corporation or company with authority to impose burdens of that kind upon shippers and consignees. The transportation of live stock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee, if to be found, at such place as admits of their being safely taken into possession."

But in that case, which arose before the passage of the interstate commerce act, the conduct of the railroad company that was complained of resulted in the imposition of a charge for the use of facilities for the unloading of live stock and delivery to the consignee in addition to the customary and legitimate charges for transportation which were assumed to be in themselves fully compensatory.

In Interstate Commerce Commission v. Railroad, 186 U. S. 320, 22 Sup. Ct. 824, 46 L. Ed. 1182, the court upheld the right of the railroads to make a distinct charge from the point of shipment to Chicago, and a separate terminal charge for delivery to the stockyards in that city, which was a point beyond their lines; but, because it did not arise in the case, the court declined to express an opinion upon the question whether the rule would be applicable to terminal services by a carrier upon its own line which it was obliged to perform as a necessary incident to its contract to carry.

In Walker v. Keenan, 19 C. C. A. 668, 73 Fed. 755, the court, in discussing the Keith Case, said there was no reason why the compensation of a carrier should not be apportioned if the public convenience were subserved thereby, but that since the passage of the interstate commerce law the apportionment should be specified in the tariff schedules for the information of shippers.

So far as the accomplishment of the great purposes of the interstate commerce act is concerned, it would not seem to be very material whether charges for icing are fixed at a specified rate per ton of ice furnished and therefore separately stated in the schedules, or measured

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according to the weight of the commodity subject to refrigeration and the distance of transportation, in which event they might be more easily covered into the transportation rate. The former method would probably result in a closer approximation of charge imposed to value of service performed, and be more adjustable to the variable conditions of the seasons and the demands of the shippers, while the latter might the better conduce to simplicity in the schedules. Which should be adopted would seem to be a question of practice and expediency, rather than one of law.

The Interstate Commerce Commission, not considering that the question was foreclosed by any provision of the act of Congress, has thus expressed its views:

"There are at least three methods which may be adopted by the carrier in imposing such charges. It may charge for the ice actually used at so much per ton: it may charge for the service of refrigeration at so much per car, whatever the quantity of ice consumed may be; or it may charge at a rate by the hundred pounds, when property moves under refrigeration. All these different systems have their advantages and disadvantages. Some witnesses were in favor of one system, some of another. It is not within the province of this commission to prescribe the method which shall be adopted, so long as the price charged the shipper is fair."

This was said in a cause pending before the commission involving the very practice now challenged by the plaintiff. 11 Int. Com. Com'n R. 129, 141. The commission disposed of the complaint against the Michigan Central Railroad Company, the defendant here, by stating that it had purchased its own refrigerator equipment and would in the future charge $2.50 per ton for the ice actually consumed, and concluding:

"We have found that this is a reasonable price and that company should therefore be dismissed from this proceeding."

In various other instances the commission has made rulings as to the reasonableness of icing charges that were separated from the transportation rate in the schedules. The Truck Farmers' Case, 6 Interst. Com. Com'n R. 295; The Citrus Fruit Case, 9 Interst. Com. Com'n R. 182; Id., 10 Interst. Com. Com'n R. 590, 608; The Michigan Fruit Case, 10 Interst. Com. Com'n R. 360.

But, even if it could be said that the defendant violated the provisions of the act of Congress (Act Feb. 4, 1887, c. 104, § 8, 24 Stat. 382 [U. S. Comp. St. 1901, p. 3159]), by dividing its rate and separately specifying a charge for icing, it does not follow that plaintiff has made a case. This action was brought under the eighth section of the act:

"That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

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To support a recovery under this section, there must be a showing of some specific pecuniary injury. A cause of action does not necessarily arise from those acts or omissions of a common carrier that may subject it to a criminal prosecution by the government, or to corrective or coercive proceedings at the instance of the commission. It is not every imperfect or inaccurate specification of rates in the schedules that will give to a shipper a cause of action for damages. He must show, either that there has been some unreasonable or excessive charge imposed, or some unlawful discrimination practiced against him. The plaintiff here, having founded his cause of action upon a technical construction of the law, and without the basis of any ruling or order of the commission, seeks to recover without proof of pecuniary damage. The schedules of rates filed with the commission clearly showed that there was a charge for icing, and that it was not included in or absorbed by the ordinary second-class rate from Matawan, Mich., to Duluth, Minn. Stating this fact conversely: It clearly appeared that the second-class rate specified in the schedules, and doubtless applying to many commodities that are not moved under refrigeration, did not include compensation for the icing of cars containing fruits that do require refrigeration. It goes without saying that the icing service entails an expense not required in the transportation of most commodities, and that it calls for a just and reasonable recompense. There is no presumption that rates specified in official schedules are unjust and unreasonable. The record before us discloses no finding and ruling of the commission against the reasonableness of the rates, and there was no proof upon the subject. There was no proof that what the plaintiff actually paid was in excess of a reasonable compensation for the services performed, whether considered separately or in the aggregate; nor does it appear that any discrimination of any kind or character was practiced against it. In the absence of a showing of injury or damage, there can be no recovery.

But one other matter requires notice: The plaintiff complains of a denial by the trial court of its application for an order requiring the presence at the trial of officers of the defendant and the production of records. Without considering the sweeping and general character of the application, or whether the plaintiff secured all that was required by the testimony of the officer whose deposition was taken and by the documents read in evidence at the trial, it is sufficient to say that no exception appears to have been taken to the ruling of the court.

The judgment is affirmed.

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(149 Fed. 111.)

## In re SMITH & NIXON PIANO CO.

(Circuit Court of Appeals, Eighth Circuit. November 21, 1906.)

No. 57.

BANKRUPTCY—RECOVERY OF COST—BAILMENT OR SALE.

Pianos were shipped to a corporation dealing in musical instruments, which subsequently became a bankrupt, under a written contract stating that they were furnished on memorandum, also the price of each kind, and providing that the bankrupt should "pay for every piano they sell, cash." When pianos were furnished under the contract, invoices were sent containing a recital that the shipper sold the pianos described to the bankrupt, and shortly before bankruptcy proceedings were instituted the shipper wrote the bankrupt, stating that, when the pianos were consigned, it was with the understanding that they should be settled for as sold and paid for in cash when sold, that the shipper insisted on a settlement, and that, if it was not convenient to send cash, the shipper would accept paper secured by the collateral, but "did not care for dead stock." *Held*, that the transaction was a bailment, and not a sale; and that the title to the unsold pianos never passed to the bankrupt.

Petition for Revision of Proceedings of the District Court of the United States for the Western Division of the Western District of Missouri, in Bankruptcy.

Elijah Robinson, for petitioner.

Edwin A. Krauthoff, for respondent.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. This petition to revise presents a controversy over the ownership of six pianos. The piano company intervened in the bankruptcy proceedings and petitioned for their restoration, claiming that it had consigned them to the Martin-Vernon Music Company, the bankrupt, to be sold on commission. The trustee who had possession of the pianos asserted that the transaction was a sale, and that by virtue of the adjudication and his appointment and qualification he had succeeded to the bankrupt's title. A decision of the referee in favor of the trustee was affirmed by the District Court (132 Fed. 983).

At the hearing below the facts were not disputed. There was no conflict in the evidence, which consisted of a contract, two invoices, a letter, and some oral testimony. The testimony of the witnesses did not in any wise affect the legal import of the writings. The sole question was as to the character of the transaction between the piano company and the bankrupt—whether a bailment or a sale—and it turned wholly upon the construction of the written instruments. The question was therefore one of law, and a petition to revise is a proper method of bringing such a question to this court.

The pertinent provisions of the contract are as follows:

"The Smith & Nixon Manufacturing [Piano] Company agrees to furnish to the Martin-Vernon Music Company, of Kansas City, Mo. [the bankrupt], Smith & Nixon and Ebersole pianos, on memorandum, at following prices: [then follows a schedule showing the styles of pianos and the respective prices.] The Martin-Vernon Music Company agrees to pay for every piano they sell, cash, and will receive for advertising purposes, on the above prices, a special

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**discount of $15.00 on the Ebersole Piano, and $25.00 on the Smith & Nixon Piano."**

There is also a provision that the bankrupt should have full control of certain designated territory and that the piano company should not give prices to any other dealer therein. When the pianos were furnished under this contract invoices were sent containing the words:

**"The Smith & Nixon Piano Company * * * Sold to the Martin-Vernon Music Company, Kansas City, Mo."**

About six months afterwards, and shortly before the commencement of the proceedings in bankruptcy, the piano company wrote to the bankrupt as follows:

**"When we consign the pianos to you, it was with understanding they would be settled for as sold and paid for in cash, when sold, and that they would be moved with reasonable promptness. It is now over four mos. since these goods were received. We must insist upon a settlement. If not convenient to send cash, we will accept your paper secured by the collateral, and give you liberal time. We are willing to help you but do not care for dead stock."**

While the case is not free from doubt, a careful consideration of the terms of the original contract has led us to the conclusion that the parties intended that no title should pass from the piano company, and that no debt should be created unless the pianos were sold by the bankrupt. At no place was the word "sale" or any term of similar import used. The piano company was to "furnish pianos on memorandum," an expression which is more appropriate to a bailment for sale than it is to a sale. On the other hand, the bankrupt agreed to "pay for every piano they sell, cash"; and there was no provision for payment in any other event or at any other time or in any other manner. The reasonable inference from this is that, if the bankrupt did not sell the pianos, it did not owe and was not to pay for them. The payment of a consideration or the creation of a debt for it is an essential element of a sale; but here there was no payment at the delivery of the pianos, nor did a debt arise either by expressed provision or by implication. There was no present or fixed obligation to pay either then or in the future. Nor can the promise of the bankrupt to pay a specified amount for every piano it sold be turned into a promise to pay within a reasonable time or earlier if sale is made. This peculiar phraseology of the contract does not relate to the time of maturity of a debt created by the furnishing of the piano. On the contrary, it was intended to define the condition upon which a debt arose. In other words, it signifies that, if there was no sale, there should be no debt. If the piano company had sued the bankrupt for the price of the pianos, it seems clear that it would have been a sufficient defense that the latter had been unable to sell them. The obligation of the bankrupt to pay for each piano it sold is the ordinary obligation of a factor or commission merchant who, having received goods on commission, has made a sale of them. While there was no express reservation by the piano company of dominion over the pianos before they were sold, such dominion nevertheless existed as a natural incident to a title it had not parted with. We start with title in the piano company, and unless an intention that it

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pass to another can be discovered it remains where it was with all appurtenant rights. It is said that the schedule of fixed prices appearing in the contract tends to show that a sale was intended. We held, however, in Re Columbus Buggy Co., 74 C. C. A. 611, 143 Fed. 859, that such provisions were comparatively unimportant in determining whether a transaction was a bailment for sale or a sale. The specification of fixed prices is as appropriate to one as to the other. It is not an uncommon feature of contracts of bailment, and it means that the commission of the consignee is such sum as he may obtain for the property above the price specified. Allowances or discounts for advertising such as were made to the bankrupt are obviously for the benefit of both parties, and they make for neither construction.

As to the invoices and the letter. The acts of the parties subsequent to the written contract may be regarded for two purposes: First, as an aid to the construction, if the true meaning of the contract is doubtful and the acts were before a controversy arose; and, second, to ascertain whether the parties have mutually agreed upon a change or modification of their original contract relations. The fact that the invoices contained the words "Sold to the Martin-Vernon Music Company" may be disposed of by reference to Dows v. Bank, 91 U. S. 618, 630, 23 L. Ed. 214, where it was said that an invoice is not evidence of a sale; that it is a mere detailed statement of the nature, quantity, and cost or price of the things invoiced, and is as appropriate to a bailment as to a sale. See, also, Sturm v. Boker, 150 U. S. 312, 326, 14 Sup. Ct. 99, 37 L. Ed. 1093, and Schenck v. Saunders, 13 Gray (Mass.) 37, 40.

While it is not altogether clear what conception of the transaction the writer of the letter had, the language he used is as consistent with the idea of a bailment as with that of a sale. He said that the pianos were consigned, when it would have been quite natural for him to have said that they were sold if such was the case. He said they were to be settled for as sold and paid for in cash when sold; that they were to be moved with reasonable promptness, and since more than four months had elapsed a settlement was insisted on. He then concluded:

> "If not convenient to send cash, we will accept your paper secured by the collateral, and give you liberal time. We are willing to help you, but do not care for dead stock."

The words "the collateral" signify that the writer had in mind not collateral in general, but some particular collateral, and it probably was paper taken by the bankrupt upon sales which it had made of two pianos furnished under the same contract, but not involved in the present controversy. Again, if the pianos had been sold to the bankrupt, the piano company having parted with its title to them, it is not apparent why the writer should have said that his company did not care for dead stock. He could hardly have referred to a debt of the bankrupt as "dead stock." The expression is, however, perfectly consistent with the position that the goods were consigned for sale on commission; that it was understood that the bankrupt would be able to sell them soon; that several months had elapsed without results to the piano company; and that, while it was willing to help the bankrupt, it did not desire to carry dead stock.

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But if it be said, and there are grounds for the position, that the letter fairly bears the construction that the piano company, having consigned the pianos on commission, was disappointed with the outcome and was trying to force the bankrupt to settle for them by giving its note secured by collateral, it must be at once answered that the effort failed. The bankrupt was silent. It did not agree to the demand of the piano company, and the relations of the parties, not being changed by mutual consent, remained as they originally were. And, if the letter were susceptible of this construction, it should also be added that it would not estop the piano company from asserting its rights under the original contract. No element of estoppel existed. The bankrupt does not appear to have consented to that construction, to have yielded to the demand for settlement, or to have altered its position in any way by reason thereof. An estoppel does not arise from the bare assertion of an untenable position by one of the parties to a transaction.

The petition to revise is sustained, and the order of the District Court is vacated and set aside, with direction to allow the claim of the petitioner to the property in controversy.

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(149 Fed. 114.)

## McBRIDE et al. v. FARRINGTON.

(Circuit Court of Appeals, Second Circuit. December 4, 1906.)

No. 5.

INDIANS—INDIAN LANDS—LEASES—VALIDITY.

Rev. St. § 2116, provides that no purchase, grant, lease, or other conveyance of land from any Indian nation or tribe of Indians shall be valid, unless the same be made by treaty or convention entered into pursuant to the Constitution; but Act Cong. March 1, 1889, c. 333, 25 Stat. 784, repealed all laws previously existing intended to prevent the Chickasaw Nation from lawfully making leases for mining coal for a period not exceeding 10 years. *Held*, that leases executed by the national secretary of the Chickasaw Nation, in October, 1890, for the mining of coal and other minerals, were valid, so far as they authorized the mining of coal for a period not exceeding 10 years.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indians, § 45.]

Wallace, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Western District of New York.

For opinion below, see 131 Fed. 797.

T. C. Becker, for plaintiff in error.

Frank Brundage, for defendant in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

LACOMBE, Circuit Judge. The plaintiff concedes that, unless he can establish the proposition that the leases executed by the national secretary of the Chickasaw Nation (October 2 and October 20, 1890) were wholly void, so that there was a "total failure of consideration,"

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he cannot recover. He contends that they are void because of the provisions of section 2116, Rev. St. U. S., which reads:

"No purchase, grant, lease or other conveyance of land, or any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution," etc.

The section, however, was modified, before the making of these leases, by Act March 1, 1889 (25 Stat. 784, c. 333), which repealed all laws theretofore enacted to prevent the Indian nation in question or any other from lawfully making leases for mining coal for a period not exceding 10 years. The leases in question are for the mining of coal, iron, petroleum, oil, gas, asphaltum, and other minerals. If void as to the other minerals, they are apparently valid as to the coal. For what length of time they purported to run is not shown by the record. If for an indefinite time, the terms of the act would no doubt restrict them to 10 years. It is difficult to see how such leases, which apparently conveyed some rights for a restricted period, can be held to be so utterly valueless as to constitute an entire failure of consideration.

These reasons lead to an affirmance.

Some reference has been made to Act June 28, 1898 (30 Stat. 495, c. 517); but, since that was not passed until two years after the leases were assigned to the Wisconsin corporation, it has no bearing on the question here presented.

WALLACE, Circuit Judge (dissenting). I think the judgment should be affirmed, but I do not concur in the opinion of the court. I think the leases were void because the statute declares such leases void, and the repealing act authorizing 10-year leases for mining coal does not change the terms or effect of the original statute. It is well settled that when a conveyance or contract contains conditions, some of which are legal and others illegal, and they are severable and separable as respects consideration and performance, the latter may be disregarded and the former enforced. But the exception to this principle is equally well settled. As was said by Mr. Justice Storey in United States v. Bradley, 10 Pet. 363, 9 L. Ed. 448:

"The only exception is when the statute has not confined its prohibitions to the illegal conditions, covenants, or grants, but has expressly, or by necessary implication, avoided the whole instrument to all intents and purposes."

The leases here are indiscriminately for the mining of other minerals, as well as coal, and it does not appear that they were not for a period exceeding 10 years. If they had been for that time only, they would, in my judgment, have been void by the terms of the original statute.

The case has been argued at the bar as though the action were one by the creditors of a Wisconsin corporation to charge the defendant with individual liability as a stockholder under certain provisions of the Statutes of Wisconsin of 1898, viz., sections 1753 and 1773. An analysis of the complaint, however, shows that it proceeds upon the theory of fraudulent representations made by the defendant, by which the plaintiffs were induced to expend moneys and furnish labor and

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materials for the Wisconsin corporation, and thereby sustained damages. The complaint states the following averments.

"That the defendant and certain other persons in 1897 organized a mining corporation under the laws of the state of Wisconsin, whereof the amount of the capital stock was fixed at $1,500,000, divided into shares of the par value of $10 each; that the defendant subscribed for 22,220 shares of the capital stock, and various other persons subscribed and agreed to pay for certain other shares; that neither the defendant nor any of the other persons ever paid 20 per centum of the capital stock of the corporation, nor was that amount ever paid in any way, but that the corporation issued and delivered the 22,220 shares subscribed for the defendant without any consideration; and that said issue of stock to the defendant and all the issues of stock by the corporation to the shareholders thereof were fictitious, and were issued for a pretended and valueless assignment of certain oil and mining leases in Indian Territory, which were valueless or of little value, and were known to be by the defendant and the other subscribers at the time they subscribed for and received the issue of stock."

The complaint then alleges that the defendant and other directors of the corporation fraudulently and falsely represented to the plaintiffs that the corporation had large pecuniary means and valuable property; that upwards of $1,000,000 worth of its stock at par had been subscribed for by persons who were pecuniarily able to pay for same, and some other shares had been paid for in cash; that in fact all the capital stock that had been subscribed for had been issued and delivered without consideration other than the transfer to said corporation of said valueless oil and mining leases and other representations of the defendant were untrue; that thereupon the plaintiffs, being deceived by said misrepresentations, were induced to and did expend money, perform work, and furnish materials for the corporation, and were induced to and did give credit to the corporation in the belief of the truth of the representations stated; and that the corporation and all of its shareholders, except the defendant, are wholly insolvent, and the liability of the corporation to plaintiffs is due and unpaid.

The court found as facts, among other things, that upon the organization of the corporation and in October, 1896, the corporation issued 141,990 of the 150,000 shares of capital stock to a trustee representing the defendant and other beneficiaries, and received in payment therefor the assignment of certain charters or leases procured from the Chickasaw Nation of Indians, granting the privilege of mining for coal, petroleum, and other minerals on certain lands within the territory of that nation; that the assignments of the leases were in good faith estimated by the directors and officers of the corporation as more than equal to the par value of the capital stock; that the trustee thereafter duly transferred the stock to the corporation, and in consideration thereof the corporation issued 100,000 shares thereof to the beneficiaries of the trustee, including 22,220 shares to the defendant. The court also found that the defendant had no personal knowledge as to any expenditures of money, performance of work, or furnishing of materials for the corporation by the plaintiffs; that no statements or representations were made by the defendant, or any others, to induce the plaintiffs to enter into the contract; and that the plaintiffs were not induced to expend any moneys or perform any labor or furnish any materials for the corporation, or to give credit to the corporation

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by any false or fraudulent statement or representation made to them by the defendant or the officers or directors of the corporation.

It is contended by the plaintiffs in error that upon the facts found there should have been a judgment for the plaintiffs by force of section 1773 of the Wisconsin Statutes of 1898. This section, after providing that in stock corporations the first meeting may be held at any time after one-half of the capital stock has been subscribed, reads as follows:

"No such corporation shall transact business with any others than its members until at least one-half of its capital stock shall have been duly subscribed and at least 20 per centum thereof actually paid in; and if any obligation shall be contracted in violation hereof the corporation offending shall have no right of action thereon; but the signer and signers of the articles and the subscriber and subscribers for stock transacting such business or authorizing the same, or having knowledge thereof, consenting to the incurring of any debt or liability, as well as the stockholders then existing, shall be personally liable upon the same."

The argument for the plaintiffs in error is that the charters or leases transferred to the corporation in payment of its capital stock were void, because of the law of Congress found in section 2116 of the Revised Statutes of the United States; that the transfer of these void leases was not a payment to the corporation in property, such as is authorized by section 1753 of the Wisconsin Statutes of 1898; and that consequently the 20 per centum required by section 1773 of the Wisconsin Statutes of 1898 had not been paid in.

Assuming, for present purposes, that the leases were void, and that when the debt or liability of the corporation to the plaintiffs was incurred the 20 per centum of the capital stock had not been paid in, I can see no ground upon which the plaintiffs were entitled to recover. As I understand the terms of section 1773, no liability rests upon a stockholder unless he has consented to the incurring of the liability sued on with knowledge that the requisite payment of 20 per centum has not been made. The meaning of the section is to make a stockholder liable to the same extent and under the same conditions as a signer of the articles or a subscriber for stock. There is no finding by the court that the defendant knew of the incurring of any liability to the plaintiffs, but the finding explicitly negatives the fact. It follows that, so far as the case was based on any statutory liability of the defendant, the plaintiffs were not entitled to recover, and the judgment was correct.

Irrespective of this consideration, however, the action was one for fraudulent representations, and the plaintiffs were not entitled to recover without proof of actual fraud. The allegations of fraud were found against the plaintiffs. By the Code of Civil Procedure of this state (section 541) there was a failure of proof which was fatal to any recovery by the plaintiff. Where fraud is alleged as the basis of the action, the law will not permit a recovery by proof of a cause of action upon a contractural liability. Degraw v. Elmore, 50 N. Y. 1; Barnes v. Quigley, 59 N. Y. 265. It would have been error to allow an amendment of the complaint changing the cause of action to one on contract.

For these reasons, I think that plaintiffs were not entitled to recover, and that judgment was properly ordered for the defendant.

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(149 Fed. 748.)

## STUART v. AUGER & SIMON SILK DYEING CO.

(Circuit Court of Appeals, Third Circuit. January 11, 1907.)

No. 25.

PATENTS—ANTICIPATION—PROCESS AND MACHINE FOR LUSTERING SILK.

The Stuart patents, No. 705,715, for a process of intensifying the luster of silk fiber, and No. 705,716, for a machine for carrying out such process, are both void; the former for anticipation by the Hendrie British patent, No. 10,938 of 1845, and the latter for anticipation by the Brizon French machine, from which that of the patent was copied, and for lack of patentable novelty, in view of the prior art.

Appeal from the Circuit Court of the United States for the District of New Jersey.

For opinion below, see 139 Fed. 935.

James C. Chapin, for appellant.

Joseph A. Stetson, for appellee.

Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. This is an appeal from a decree of the Circuit Court of the United States for the District of New Jersey dismissing a bill in equity brought by Charles Stuart, the appellant, against The Auger & Simon Silk Dyeing Co., charging infringement of United States patents Nos. 705,715 and 705,716. Both patents bear date July 29, 1902, and were issued to the appellant; the application for the former having been filed January 17, 1902, and for the latter January 20, 1902. Patent No. 705,715 is for an alleged improvement in the "Process of Intensifying the Luster of Silk Fiber" and patent No. 705,716 is for alleged improvements in "Machines for Increasing the Luster of Silk." In the description of the former patent Stuart says:

"The object of the invention is to give to silk fiber and the fabric into which it is woven a glossiness or permanent luster of great brilliancy; and it consists in taking the skein of silk fiber as it comes from the hydro-extractor after being dyed, stretching it while damp, and subjecting it while so damp and stretched for three or four hours to a drying heat of a temperature of about 120° Fahrenheit until completely dry. The old process of drying the fiber before placing it in skeins two or three at a time on stretching-posts in a steam chest or stretcher, where it is treated to a bath of live steam, which is admitted into the steam-stretcher, completely enveloping and moistening the fiber for about three minutes while it is being stretched, leaves the silk damp after being stretched in the steam-chest, and in drying afterwards invariably shrinks and loses its luster, while my process has in practice given better results, producing a more brilliant and permanent luster, which is retained and shown in the finished fabric."

There is only one claim, and it is as follows:

"The process of intensifying the luster of silk fiber, which consists in taking the skeins directly from the hydro-extractor after dyeing, and, while still damp, stretching them and simultaneously maintaining them in a stretched condition and subjecting them in a closed chamber to dry air at a temperature

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of about 120° Fahrenheit, thereby preventing shrinking during the drying, as set forth."

In the description of patent No. 705,716 the patentee says:

"My invention relates to a machine for increasing or intensifying the luster of silk; and the object of my improvements are first, to provide a machine that will give to the silk fiber a permanent and more brilliant luster, which will be retained and shown in the finished fabric; second, to afford facilities for the treatment of a large quantity of fiber at one time; third, to reduce the cost of the treatment of silk fiber after it is dyed by the saving in time and labor required in its preparation for manufacturing purposes; fourth, to produce a machine upon which the moistened fiber after it is dyed may be held and stretched and prevented from contracting while being submitted to a drying heat in a suitable room or compartment, so that the gradual drying will exert a strain upon the fiber until it is dry, after which it will not shrink."

The charge of infringement relates to all of the claims, which are three in number and as follows:

"1. In a machine for increasing the luster of silk, the combination of a frame, means for suspending therefrom a series of interdependent skeins of wet silk, flexible means connecting each series with a mechanism located in the lower portion of the frame, and which is adapted to stretch the silk, and to maintain it in a stretched condition while being dried to prevent shrinkage, substantially as set forth.

"2. In a device for increasing the luster of silk, the combination of a frame, a series of horizontal rods suitably connected and depending from said frame, said rods being adapted to hold skeins of silk stretched between each pair, flexible means connected to the lower portion of the frame, and to the lowest rod of each series for stretching the wet skeins and for preventing the contraction of the same while drying, and ratchet means for holding the said flexible means, as set forth.

"3. In a device for increasing the luster of silk after it is dyed, the combination of a frame, horizontal rods suitably connected and depending from said frame, said rods being adapted to hold skeins of wet silk stretched around each pair, flexible means connecting the lowest rod with a mechanism in the lower portion of the frame, and such a mechanism for stretching the wet skeins and for preventing the contraction thereof while drying, substantially as set forth."

The substantial defences are invalidity of the patents in suit and non-infringement. It is unnecessary to discuss the latter defence as we are convinced that the former is supported by the evidence and required the dismissal of the bill. Patent No. 705,715 was, we think, anticipated by the British patent No. 10,938, granted to Robert James Hendrie, in 1845, for "An Improvement in the Preparation of Silk." Hendrie in the description of his invention says:

"My improvements in the preparation of silk apply to that article in the form of hanks or skeins, dyed or undyed, and consist in a novel mode of treatment or preparation, intended to improve the appearance of the silk by producing upon the surface of its fibres a beautiful lustre. The manner of effecting this improvement is by submitting the silk in the hank or skein, when damp, to the action of currents of air, whilst the fibres of the silk are held in tension. There may be various contrivances employed for carrying out this object. One of these I will explain in reference to the accompanying drawing, which exhibits such an apparatus as I have found to answer the purpose, though I do not intend to confine myself to the employment of such a construction alone. * * * It must be obvious that skeins or hanks of silk may be distended by various contrivances; I therefore do not intend to confine myself solely to the use of the machine above described," &c.

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The first claim of the patent was as follows:

"Firstly, preparing silk by submitting it in tightly distended skeins, or hanks, when damp, to the action of heated air or air of the ordinary temperature, in which it must remain until dry, for the purpose of producing upon its surface a lustre or gloss."

By the Hendrie process skeins of damp silk were stretched by mechanical means and submitted while subjected to such stretching to the action of "heated air or air of the ordinary temperature" until dried. By the process of patent No. 705,715 in suit the skeins of silk while damp are stretched by mechanical means and submitted while subjected to such stretching to the action of "dry air at a temperature of about 120° Fahrenheit." The "heated air" of the earlier patent includes the "air at a temperature of about 120° Fahrenheit" of the later patent. The heated air in either case is employed to dry the silk, and the mere designation in the later patent of the approximate degree of heat does not differentiate the process from that of the earlier. The claim of the patent in suit, it is true, requires that the drying of the silk should be effected in "a closed chamber." The essence of the invention is that damp silk while subjected to stretching shall be dried by the air to which it is exposed, in order to impart lustre, and whether this is effected in a closed chamber or in the open air is immaterial so far as identity of the process with that of the earlier patent is concerned. Certainly drying the silk by the action of heated air, includes drying in "a closed chamber" as well as drying in an uninclosed space. We perceive no ground on which the claim of the process patent in suit legitimately can be restricted to the method of operation of the specific mechanism illustrated by the drawings or mentioned in the description. The cases cited on the part of the appellant in this connection are not analogous to that now under consideration and fail to sustain his contention. Indeed, Stuart in the description of his machine patent No. 705,716, the drawings of which are exact copies of the drawings of his process patent, says:

"As the mechanism shown is capable of many modifications which may be made in the construction of the machine without departing from the essential principles involved in my invention, I do not wish to limit myself strictly to the specific construction shown, and will hereinafter claim, broadly, a machine embodying such elements as the invention necessarily implies."

Nor do we perceive the materiality of the appellant's contention in this regard, for on the assumption that the process should be treated as limited to the method of the specific mechanism shown, the broader claim of the Hendrie patent would still work an anticipation.

The machine patent in suit, No. 705,716, we think is void for lack of patentable novelty in view of the prior art. There is no color for an assertion of patentable invention aside from the arrangement of horizontal bars, referred to in the evidence and argument as "equalizing levers," for stretching the skeins of silk, and the device for maintaining them in a stretched condition while being dried, to prevent shrinkage or contraction. The counsel for the appellant in their brief admit that "his equalizing levers for so stretching the silk, and mechanism for locking the silk stretched against shrinkage is the invention

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of his machine patent." There was nothing new in the idea of a ratchet or other equivalent device for maintaining the skeins of silk in a tense condition until dry. Figure 2 of the drawings in the Hendrie patent, above referred to, shows such an equivalent device, and in the description Hendrie explains its operation as follows:

"The socket d, with its arms f, f, f, are made to ascend or descend upon the shaft b, by means of a vertical screw g, working in a screw-box h, h, fixed in the upper part of the hollow shaft, which screw g is turned by a capstan or lever i, i, attached to its top. * * * I take any convenient number of hanks or skeins of silk, and extend several of them over each of the pairs of parallel arms, c, f, as represented at k, k, k, in Fig. 2. All the radial arms, c, c, c, and f, f, f, being then charged with the skeins or hanks of silk. I then, by means of the capstan or levers, i, i, turn the screw g, for the purpose of raising the socket d with its arms f, f, f, by which rising of the arms f, f, f, the skeins or hanks of silk will become stretched and held in tension. * * * It must be obvious that skeins or hanks of silk may be distended by various contrivances. I therefore do not intend to confine myself solely to the use of the machine above described, though I consider it to be perfectly effective," &c.

If there was anything new in the mechanism of the patent in suit, it was in the flexible arrangement of horizontal bars operating as equalizing levers, by means of which the skeins of silk are subjected to a more uniform tension, calculated to produce a more uniform lustre. Such a flexible arrangement of bars operating in like manner as equalizing levers, however, was contained in the Weidemann machine for imparting lustre to silk, which was in use prior to 1885; the difference between it and Stuart's machine being that, while in the former weights were employed to hold the silk against contraction or shrinkage when in a stretched condition, in the latter a ratchet or locking device is used for the same purpose. But, as has been stated, the Hendrie machine employed a locking device to accomplish the same result. Without referring to the other evidence adduced by the appellee touching the prior art, we regard the disclosures of the Hendrie and Weidemann machines as wholly negativing patentable novelty in that of Stuart. We further think that the mechanism of patent No. 705,-716 was anticipated by the Brizon machine, which was imported to this country from France in May and erected in June, 1900, in the silk dyeing establishment of Emil Geering in Paterson, New Jersey, where the appellant was employed at the time and knew of its erection and use. The fact of the importation and erection of the French machine at the time and place above stated is clearly established by the evidence and is not disputed. This antedated the application for the machine patent in suit by more than a year and a half. The appellant's machine beyond all doubt is a close copy of that of Brizon. Stuart claims that he devised five machines for imparting lustre to silk, and that they were erected and used in July, 1899, February, 1900, July or August, 1900, the fall of 1900 and the spring of 1901, respectively; and that the first two were erected prior to the importation of the Brizon machine, and the remaining three subsequently. He testifies to the effect that the first machine was erected for only experimental purposes. He admits that the third, fourth and fifth were imitations of the French machine. Of the third he says that "the machine was constructed according to the pattern of the French

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machine," and that it resembled it "as closely as I could construct it, to give it strength and durability." He states that the fourth machine was "the same; practically the same" as the third; and that the fifth was "constructed after the pattern of the third and fourth"; and further, that the model which he supplied to his patent solicitor was "made according to how I constructed the machine, after the pattern of the French machine," and the drawings of the patent in suit were made "from the machine I constructed, after the pattern of the French machine, from either one, either third, fourth or fifth, as they are alike." Under these circumstances it was necessary in order to avoid anticipation that Stuart should carry the date of his invention back of the importation of the Brizon machine. This he has endeavored to do by the production of evidence in support of his alleged machine of February, 1900. As the date of the application for a patent presumptively is the date of the invention embodied in it, and as the French machine which clearly embodies the mechanism of the machine patent in suit was brought into this country and there used with the knowledge of the appellant about twenty months prior to the date of application, the burden rested upon him to establish by satisfactory and convincing proof, that his invention antedated the arrival of the foreign machine. But this he has failed to do. The evidence in support of the construction and operation at an earlier date of his alleged first and second machines falls far short of the full and clear proof that was requisite. Indeed, the evidence taken as a whole creates the gravest suspicion of bad faith on the part of the appellant in making his contention of invention prior to the date of his knowledge of the Brizon machine.

We are satisfied that the decree of the court below should be affirmed with costs. And it is so ordered.

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(149 Fed. 42.)

## BOSTON & M. R. CO. v. GOKEY.

(Circuit Court of Appeals, Second Circuit. December 4, 1906.)

No. 11.

1. MASTER AND SERVANT—INJURIES TO SERVANT—RAILROADS—DEFECTIVE APPLIANCES—ASSUMED RISK.

Plaintiff, a brakeman, while in defendant's employ, was struck by a switch target and thrown to the ground from a moving freight car while he was climbing up the ladder to release a brake, with his back to the switch. The switch had been changed shortly before, and plaintiff testified that he had no knowledge of its dangerous proximity to the track and had never been warned concerning the same. *Held*, that the danger from such structure was not one of the ordinary risks which plaintiff assumed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 556.

Assumption of risk incident to employment, see Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

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2. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether plaintiff was guilty of contributory negligence was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1124.]

3. COURTS—FEDERAL COURTS—JURISDICTION—COURT OF APPEALS.

Act Cong. March 3, 1891, c. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549], provides that writs of error may be taken direct to the Supreme Court in any case in which the jurisdiction of the circuit court is in issue, and section 6 (26 Stat. 828 [U. S. Comp. St. 1901, p. 549]) declares that the Circuit Courts of Appeal shall have jurisdiction in all cases except those provided for in section 5. *Held*, that the Circuit Court of Appeals has no jurisdiction to pass on questions challenging the jurisdiction of Circuit Courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1099.

Jurisdiction of Circuit Court of Appeals in general, see Lau Ow Bew v. United States, 1 C. C. A. 6; United States Freehold Land & Emigration Co. v. Gallegos, 32 C. C. A. 475.]

Wallace, Circuit Judge, dissenting in part.

In Error to the Circuit Court of the United States for the District of Vermont.

See 130 Fed. 992, 994.

Writ of error to the Circuit Court of the United States for the District of Vermont to review a judgment entered on the verdict of a jury in favor of the plaintiff for $3,350.

G. B. Young, for plaintiff in error.

E. A. Cook and H. W. Hovey, for defendant in error.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The plaintiff, a brakeman in the employ of the defendant, was, while in the discharge of his duties, struck by the target of a switch and thrown to the ground from a moving freight car. He received injuries which resulted in the amputation of one of his feet three inches above the ankle. The switch which caused the accident was located in the freight yard at Lyndonville, Vt., having been placed in position but a few weeks prior to the accident. The dangerous proximity of the target to the track was unknown to the plaintiff as he testified that he had never operated it in its changed location or been warned regarding it. It was so near the track that while in the act of climbing up the ladder of the moving car to release a brake, with his back to the switch, he was caught by the target and hurled to the ground. In other words, there was not room enough to permit the body of a brakeman in that position to pass in safety.

It cannot be successfully maintained that the danger from such a structure was one of the ordinary risks assumed by the plaintiff on entering the defendant's employ. The law imposed upon the defendant the duty of furnishing for the use of its servants fit and suitable means and appliances. The jury found that the defendant failed to perform this duty; they found, in effect, that the defendant furnished an unsafe switch with the target so located that it served as a trap in which employés, ignorant of its position, might be caught and killed or injured. Whether such a structure was one reasonably safe and



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proper to be maintained at the place described was a question of fact and was presented to the jury under instructions as favorable as the proofs warranted.

The same statement is true as to the alleged contributory negligence of the plaintiff. It cannot be said, as matter of law, that he was at fault in not ascertaining the situation in time to avoid contact with the target. The peril was not so obvious as to justify the trial court in imputing negligence to the plaintiff in failing to discover it. In the absence of notice or knowledge to the contrary he had a right to assume that, when in the discharge of his duty he was required to mount a moving car, he would not be hurled to the ground by a target placed so near the car that his body could not pass in safety. At least it was a question for the jury.

The case is an exceedingly simple one upon the facts, involving questions which are constantly arising in negligence cases; these questions were properly sent to the jury under instructions which fairly presented the conflicting contentions of the parties and, after a careful examination of the record, we fail to find any error which warrants us in reversing the judgment. We are unanimously of the opinion that the trial was fairly and impartially conducted and that the verdict, considering the irreparable injury to the plaintiff, was a moderate one.

We refrain from discussing the jurisdictional question argued at the bar and in the briefs, for the reason that this court since its organization has uniformly held that the act creating the Circuit Courts of Appeal confers no authority upon these courts to pass upon questions challenging the jurisdiction of the Circuit Courts. Act March 3, 1891, c. 517, 26 Stat. 826 [U. S. Comp. St. 1901, p. 547]. Section 5 of the act (26 Stat. 827 [U. S. Comp. St. 1901, p. 549]) provides that writs of error may be taken direct to the Supreme Court in any case in which the jurisdiction of the Circuit Court is in issue, and section 6 (26 Stat. 828 [U. S. Comp. St. 1901, p. 549]) provides that the Circuit Courts of Appeal shall have jurisdiction in all cases except those provided for in section 5. This court has no appellate jurisdiction except such as is conferred by statute and we have been unable to perceive how the statute can be logically construed to bestow upon us a right which is expressly conferred on the Supreme Court and is expressly withheld from us. U. S. v. Lee Yen Tai, 113 Fed. 465, 51 C. C. A. 299; Fisheries Co. v. Lennen, 130 Fed. 533, 65 C. C. A. 79; Penn. Lumberman's Ins. Co. v. Meyer, 126 Fed. 354, 61 C. C. A. 254; in s. c. 197 U. S. 407, 25 Sup. Ct. 483, 49 L. Ed. 810; Sun Printing Ass'n v. Edwards, 194 U. S. 377, 24 Sup. Ct. 696, 48 L. Ed. 1027; U. S. v. Jahn, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87; Halpin v. Amerman, 138 Fed. 548, 70 C. C. A. 462.

The judgment is affirmed, with costs.

WALLACE, Circuit Judge (dissenting). Error is assigned, among others, of the denial by the court below of the motion by the defendant to dismiss the action upon the ground that because the writ for the commencement of the action was not properly served on the defendant the court had no jurisdiction of the defendant.

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The writ was dated April 25, 1904; was made returnable and notified the defendant to appear and answer at a term of the United States Circuit Court for the District of Vermont to be held on the 17th day of May, 1904; and was served by the marshal on the 2d day of May, 1904, by attaching property designated as the property of the defendant by one Folsom, its agent and division superintendent within the said district, and leaving a true and attested copy of the writ in Folsom's hands at his office in said district.

Upon the return day mentioned in the writ, the writ together with the marshal's return was duly filed, and thereupon the defendant appeared specially for the purpose of the motion to dismiss and for the filing of a plea in abatement. The motion to dismiss was based upon the face of the writ and the marshal's return of service. The plea in abatement alleged facts qualifying the statements contained in the return of the marshal, and in substance asserted that the attempted service upon Folsom was unwarranted by the provisions of the statutes of Vermont. After the court had denied the motion to dismiss and had decided in effect that the plea in abatement was bad, the defendant answered upon the merits.

The assignment of error which challenges the ruling of the court in refusing to dismiss the action presents the general question whether the court acquired jurisdiction of the person of the defendant. If the court did not by a valid service of an authorized process obtain jurisdiction, the judgment is subject to review on a writ of error taken directly to the Supreme Court. This proposition was considered and decided in Shepard v. Adams, 168 U. S. 618, 18 Sup. Ct. 214, 42 L. Ed. 602, where the case was one in which the summons required the defendant to appear and answer in a Federal Court of the District of Colorado within ten days from the time of service of the summons instead of thirty days as provided for the procedure of the state courts by the statutes of Colorado. Inasmuch as section 5 of the Act conferring jurisdiction upon this court, (Act March 3, 1891, c. 517, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549]) provides that writs of error may be taken from the Circuit Courts direct to the Supreme Court in any case in which the jurisdiction of the Circuit Court is in issue, as well as in any case which involves the constitutionality of any law of the United States, or the validity or construction of any treaty, while section 6 provides that the Circuit Courts of Appeal established by the Act shall exercise appellate jurisdiction to review by writ of error final decisions in all cases other than those provided for in section 5, the question arises whether this court can properly undertake to decide whether there was jurisdiction in the court below. In United States v. Lee Yen Tai, 113 Fed. 465, 51 C. C. A. 299, we held that this court was not authorized to decide the validity or construction of a treaty; and in Fisheries Co. v. Lennen, 130 Fed. 533, 65 C. C. A. 79, following that judgment, we decided that an appeal presenting the question of the jurisdiction of the Circuit Court, as well as other questions relating to the merits of the controversy, did not authorize this court to pass upon the jurisdiction of the court below. These two decisions were based upon our understanding of the decisions of the Supreme Court in United States v. Jahn, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87,

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and Carter v. Roberts, 177 U. S. 496, 20 Sup. Ct. 713, 44 L. Ed. 861. Since these decisions, however, the Supreme Court has considered again the proper construction of sections 5 and 6 (26 Stat. 827, 828 [U. S. Comp. St. 1901, p. 549]) in American Sugar Refining Co. v. New Orleans, 181 U. S. 277, 21 Sup. Ct. 646, 45 L. Ed. 859, and I think it is apparent from its opinion that we misinterpreted the meaning of its former decisions. I am now satisfied that unless we see fit to certify to the Supreme Court the question of jurisdiction, we have authority, and it is our duty, to entertain and decide it in all cases where the jurisdiction of the Circuit Court is invoked solely because of the diverse citizenship of the parties to the action.

In Amy v. Watertown, 130 U. S. 301, 9 Sup. Ct. 530, 32 L. Ed. 946 it was pointed out that although prior to the passage of the Act of June 1, 1872, it was always in the power of the Federal Courts, by general rules, to adapt their practices to the exigencies and conditions of the times, since the passage of that act the practice, pleadings and forms and modes of proceeding must conform to the state law and to the practice of the state courts, except when Congress has legislated upon a particular subject and prescribed a rule. And the court also declared that "When a state statute prescribes a particular method of serving mesne process, that method must be followed; and this rule is especially exacting in reference to corporations."

The Act of June 1, 1872, now section 914 of the United States Revised Statutes [U. S. Comp. St. 1901, p. 684] does not require a Circuit Court of the United States to observe a strict conformity in actions at common law to the practice and procedure existing at the time in such actions in the courts of the state within which the Circuit Court is held, but permits the Circuit Court to conform thereto "as near as may be." As was said in Ind. & St. L. R. R. Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898: "This indefiniteness may have been suggested for a purpose; it devolved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as Congress doubtless expected they would do, any subordinate provision in such state statutes which, in their judgment, would unwisely encumber the administration of the law, or tend to defeat the ends of justice, in their tribunals." In Shepard v. Adams (supra) a summons issued by the United States District Court for the District of Colorado which required the defendant to appear within ten days from the time of service was held to sufficiently conform to the statutes of Colorado regulating the practice of the state courts although those statutes provided that the time within which a summons should require the defendant to appear was twenty days. This conclusion was reached because the summons by the Federal Court was issued pursuant to a rule of that court which was adopted when the existing statutes of the state prescribed that summonses should require the defendant to appear within ten days, but which rule was not changed to conform to a subsequent change in the statutes of Colorado. The court said: "We have a right to presume that the discretion of the District Court was legitimately exercised in both adopting and maintaining the rule in question." It is apparent from the reasoning of the opinion that the summons would have been held invalid if it had not been issued in pur-

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suance of a rule of the Federal Court which conformed substantially when it was adopted to the state statutes.

The statutes of Vermont in force at the time of the issuing of the present writ, and for many days before, contained the following provisions applicable to the service of writs in actions like the present.

"Section 1088. Every writ and process returnable before the supreme and county courts, except as otherwise provided, shall be served within twenty-one days from the date of issuing the same, including the day of service, and excluding the day of issuing, and shall contain the following direction to the officer, viz.: 'Fail not but service and return make within twenty-one days from date hereof.'"

"Section 1089. The party suing out such process shall cause the same to be entered and docketed in the county clerk's office on or before the expiration of said twenty-one days, or the process shall on motion abate."

"Section 1090. The defendant shall cause his appearance therein to be entered with the clerk on or before the expiration of forty-two days from the date of such writ." The only rule of the Circuit Court of the District of Vermont which touches the case is rule 8 which was adopted prior to the enactment of these provisions and provides as follows: "All mesne process shall be returnable to the next regular term, if there shall be time for seasonable service thereof according to the laws of the state, otherwise it shall be returnable to the next regular term thereafter."

There is nothing in the rule of the Circuit Court which impinges upon the statutory provisions, and these provisions require the writ to be served within twenty-one days from its date of issuing, and allow the defendant twenty-one days at least after service in which to appear in the action. The present writ was not served or attempted to be served on the defendant until the 2d of May, 1904, or fifteen days previous to the time at which the defendant by the writ was notified to appear and answer. I cannot escape the conclusion that the motion to dismiss should have been granted.

If process is not served pursuant to the required statutory time the service is nugatory unless cured by a voluntary appearance or waiver of the defendant. It was upon that ground only that the court assumed appellate jurisdiction in Shepard v. Adams. The defendant in the present case was deprived of the full opportunity to prepare its defense which the statute was intended to afford, and though it may have had in fact sufficient time, it was entitled to assert its statutory right. The denial of that right was error.

There is respectable authority for the proposition that if a defendant appears in order to take advantage of a defective process or service, and his motion to dismiss the suit on that ground is overruled, he cannot then answer and proceed to trial without making a virtual waiver of his objections. But the weight of authority is to the contrary. "Where a special appearance is made in order to object to illegality in the service of process, or to urge any objection for which a special appearance is appropriate, such special appearance is not waived and converted into a general one by answering to the merits after the objections are erroneously overruled. It is only where the defendant

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pleads in the first instance to the merits, without any special appearance, that objections to personal jurisdiction are waived." 2 Encyclopedia of Pleading & Practice, 629. That this is the law of the Federal Courts sufficiently appears by reference to Harkness v. Hyde, 98 U. S. 476, 25 L. Ed. 237, and Southern Pacific Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942.

For these reasons I am of the opinion that the judgment should be reversed.

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(149 Fed. 48.)

## BROWN & ADAMS v. UNITED BUTTON CO.

(Circuit Court of Appeals, Third Circuit. November 10, 1906.)

No. 19.

1. BANKRUPTCY—PROVABLE CLAIMS—DAMAGES FOR TORTS.

A claim for unliquidated damages resulting from injury to the property of another, not connected with or growing out of any contractual relation, is not provable in bankruptcy, under the existing law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 480.]

2. SAME—INJURY TO PERSONAL PROPERTY BY NEGLIGENCE OR NUISANCE.

Where, therefore, wool dealers had a warehouse for the storage of wool, which adjoined a building formerly used by the bankrupt as a factory, the two being simply separated by a party wall, and by reason of excessive heat from the furnaces of the bankrupt, which penetrated through the wall, their wool was dried out and damaged, losing weight and depreciating in price, in consequence, a claim for damages for the loss, treating it either as the result of negligence or nuisance, was not provable against the bankrupt's estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 480.]

3. SAME—PROVABLE DEBTS—BANKRUPTCY ACT OF 1898—SECTION 63, SUBSECS. a, b, CONSTRUED.

The debts which may be proved under Bankr. Act July 1, 1898, as specified in section 63, subsec. a, 30 Stat. 562, c. 541 [U. S. Comp. St. 1901, p. 3447], are fixed liabilities as evidenced by a judgment or an instrument in writing absolutely owing, whether payable immediately or not; taxable costs in certain cases; and claims upon open account or upon contract, express or implied. And while it is further provided by subsection b that "unliquidated claims against the bankrupt may, pursuant to application to the court be liquidated in such manner as it may direct, and may therefore be proved and allowed against his estate," this does not make claims for unliquidated damages provable generally, nor, indeed, add anything to the class of debts which may be proved according to the preceding subsection, but has merely to do with a matter of procedure, as to how unliquidated claims, founded upon open account or contract, previously specified, may be liquidated or made certain.

4. SAME—CONSTRUCTION OF STATUTES—CONFLICTING PROVISIONS—SECTIONS DEALING WITH SPECIAL SUBJECT—SECTION 63 AND SECTION 17 OF BANKRUPTCY ACT OF 1898 CONSIDERED.

Nor are the debts which may be proved in bankruptcy under section 63 of the existing act (Bankr. Act. July 1, 1898, 30 Stat. 562, c. 541 [U. S. Comp. St. 1901, p. 3447]) enlarged by the fact that it is assumed, in section 17 (30 Stat. 550 [U. S. Comp. St. 1901, p. 3429]), regulating the effect of a discharge, that liabilities for torts are provable and so discharged, certain specified torts being thereupon excepted from the effect of a discharge; the want of harmony in this respect, between the two sections, being the result of the changes made in that section by the amendment of 1903, and, in case of conflict, section 63, which is devoted specifically to what debts are made provable, being controlling.

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Appeal from the District Court of the United States for the District of Delaware.

For opinion below, see 140 Fed. 495.

William R. Sears, for appellants.

Benjamin Nields, for appellee.

Before DALLAS and GRAY, Circuit Judges, and ARCHBALD, District Judge.

ARCHBALD, District Judge. The question is whether a claim for unliquidated damages, resulting from injury to the property of another, not connected with or growing out of any contractual relation, is provable in bankruptcy. The appellants, Brown & Adams, are wool dealers in Boston, Mass., and have a warehouse there for the storage of wool which adjoins a building formerly used for a number of years by the United Button Company, bankrupt, as a factory; the two being simply separated by a party wall. Wool in storage needs to be kept at a cool and even temperature; and the charge is that, by reason of excessive heat from the furnaces of the button company which penetrated through the party wall, the wool of the appellants was dried out and damaged, losing weight and depreciating in price in consequence, to the extent of some $12,000. The button company was put into bankruptcy in August, 1904. Just when, prior to this time, the damages which are claimed accrued, is not made clear, but it is fair to assume that some at least was within the year, and the case will be disposed of upon that basis. Claiming that the button company is liable for this loss, treating it either as the result of negligence or nuisance, proof is sought to be made for it against the estate, liquidation of the damages being suggested through the medium of a bill in equity, now pending in the superior court for the county of Suffolk, Mass., brought by the appellants against the button company and its trustee. The claim was rejected by the district court without passing upon the merits, upon the ground that it was not provable, and the propriety of that ruling is the question here.

Bankruptcy is supposedly concerned only with commercial matters, and was early confined to traders. Loveland, § 3. And, while it has been gradually extended and enlarged, the original idea has not been altogether departed from. Its purpose is to free a person from his debts, or to subject him to proceedings on account of them. This may not be controlling, but it is suggestive; and a construction which goes outside of it has certainly to be justified.

By the bankruptcy act at present in force it is provided:

"Sec. 63. Debts Which May Be Proved.—a. Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred

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in good faith by a creditor before the filing of a petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments." Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447].

This to all intents is complete in itself, being given up to an enumeration and specification of the debts which may be proved. It is, however, further provided in this same section:

"b. Unliquidated claims against the bankrupt may, pursuant to application to the Court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

As contradistinguished from the paragraph which precedes it, this subsection seems to be concerned with a mere matter of procedure, directing how a claim which is open and unsettled—such for instance as one "(4) founded upon an open account, or upon a contract express or implied" precedently specified—may be liquidated and made certain. And whether taken by itself, or with reference to the immediate context, this is the natural, if not the only, construction to be given to it.

It is contended, however, by the appellants, that it is in fact intended to cover an additional and distinct class of claims, the whole section, as indicated by its title, being devoted to the general subject of debts which are provable; the one subsection (a) dealing with those which are of a fixed and more or less absolute character, such as judgments, costs, bills, notes, and accounts, and the other (b) with those which require to be liquidated, such as damages for torts; the word "debt," as defined by the act—section 1 (11)—including a "demand or claim," and being thus broad enough to embrace both. This construction, moreover, is made necessary, as it is said, in order to bring the section into harmony with other parts of the act.

To the contrary of this, however, it is declared in Dunbar v. Dunbar, 190 U. S. 340, 350, 23 Sup. Ct. 757, 761, 47 L. Ed. 1084, that:

"This paragraph, 'b,' * * * adds nothing to the class of debts which might be proved under paragraph 'a' of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of section 63 a, to be liquidated as the court should direct."

It is true that this is somewhat aside from the immediate question before the court, which was whether a discharge in bankruptcy operated to release a contingent liability, such as an annuity, which a husband upon his divorce agreed to pay to his wife for the support of herself and their minor children. But it is not to be assumed that a construction deliberately announced in this way was not considered by the whole court, or went out unadvisedly, so as to stand as mere dictum. The law is as it is declared to be by the Supreme Court speaking by one or the other of its judges, and is not to be put aside upon any such suggestion, except as there is no other alternative. That the question is still open and undisposed of, however, notwithstanding what is so held, is confidently affirmed upon the strength of Crawford

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v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147, where in discussing this section of the act it is said:

"Paragraph 'a' * * * includes debts arising upon contracts, express or implied, and open accounts, as well as for judgments and costs. As to paragraph 'b,' two constructions are possible: It may relate to all unliquidated demands, or only to such as may arise upon such contracts, express or implied, as are covered by paragraph 'a.'"

It is upon the latter expression that the appellants particularly rely. But whatever encouragement, standing by itself, it may seem to lend, the court is careful to add:

"Whether the effect of paragraph 'b' is to cause an unliquidated claim, which is susceptible of liquidation, but is not literally embraced by paragraph 'a,' to be provable in bankruptcy, we are not called upon to decide, as we are clear that the debt of the plaintiff was embraced within the provisions of paragraph 'a' as one 'founded upon an open account, or upon a contract express or implied,' and might have been proved under section 63 a had plaintiff chosen to waive the tort, 'and take his place with the other creditors of the estate."

Taking it altogether, therefore, this utterance does not seem to carry us very far.

Assuming, however, that the question is an open one, let us see to what an independent consideration of it leads. The argument is that the right to prove must, in justice, be coextensive with the release to be obtained, and that, as it is plainly provided (section 17) that the bankrupt shall be discharged from liability for all but certain excepted torts, it must be that all which are not so excepted are entitled to come in. As said by Mr. Justice Brown, in Crawford v. Burke, supra:

"It certainly could not have been the intention of Congress to extend the operation of the discharge under section 17 to debts that were not provable under section 63a."

The one section, according to this, is to be read in the light of the other, and that construction adopted which will consist with both.

Care is to be taken, however, in this comparison, not to reverse the order of importance in which they are to be considered. Nor in case of conflict to press the argument too far. If any section is controlling in this regard, it is the section which declares what debts are provable, and not the contrary. It is not so much, in other words, that a tort of the character which we have here is discharged by the one, as that it is made provable by the other, that gives it a standing against the estate. Even if the one were true of it and not the other, the right to come in would not be established, it being possible that there is a lapse in the law in this respect, the result of imperfect adjustment, upon amendment; a conclusion to be avoided, if it can be, but not at the expense of that part of the statute which must necessarily govern.

The strength of the argument in favor of claims for torts being provable, as is thus intimated, resides in the section with regard to discharges, where it is provided:

"Sec. 17. Debts not Affected by a Discharge.—a. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the state, county, district, or mu-

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**nicipality in which he resides; (2) are liabilities for obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."**

As originally passed, instead of the word "liabilities," in clause 2, were the words "judgments in actions"; and after the word "for" were the words "frauds, or"; while nothing whatever was said as to alimony, maintenance, seduction, or criminal conversation. Claims grounded in fraud or the other causes of action specified had, therefore, as the law then stood, to be reduced to judgment in order to be saved from the effect of a discharge. Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147; Bullis v. O'Beirne, 195 U. S. 606, 25 Sup. Ct. 118, 49 L. Ed. 340. The reason why this distinction was made is not clear, but it was probably, as suggested, in order to avoid the temptation to claimants to try and bring their cases within the exception, and to do away with the necessity for going into conflicting evidence in order to do so. Other cases of false pretense, misrepresentation, or willful and malicious injury, not so protected, were thus apparently left to be released by a discharge. And, as the distinction is now removed by the substitution of the word "liabilities" for "judgments," and the exception still further enlarged by the addition of seduction and criminal conversation, the argument is that all torts not so excepted, being left to be operated upon by a discharge, must have the reciprocal right to come in and be proved against the estate, if a manifest inconsistency, not to say injustice, is to be avoided. It must be confessed that this is not easy to meet. Seduction and criminal conversation are torts, pure and simple, and cannot be resolved away, like some, as being possibly tied up to a contract. And if it was considered necessary to except these by name, without which a discharge would release them, why are not other torts such as the one which we have here, growing out of negligence or nuisance, in the same situation? Slightly modifying the words of Mr Justice Brown in Crawford v. Burke, supra: If no tort could be made the basis of a provable debt, why were certain torts excepted? Nor is the force of this weakened by the fact that, according to the decision in Tinker v. Colwell, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. Ed. 754, criminal conversation, at least when reduced to judgment, was already taken care of, the same as maintenance and alimony, as to which, to that extent, the amendment of 1903 may be regarded as merely declaratory. Audubon v. Shufeldt, 181 U. S. 575, 21 Sup. Ct. 735, 45 L. Ed. 1009; Dunbar v Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084; Wetmore v. Markoe, 196 U. S. 68, 25 Sup. Ct. 172, 49 L. Ed. 390.

It is to be observed, however, that the construction which is contended for grows out, not of positive, but exceptive, legislation. It is not declared what debts shall be released, but what shall not be.

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And they must, in terms, be first provable, in order to be excepted, and not the contrary. The only difficulty that is experienced, also, is with regard to the changes introduced by the amendment of 1903, in part, as we have seen, unnecessary; as to which, it may well be that in providing, out of extra caution, that certain things should not be discharged, care was not taken to note the possible effect upon other parts of the law, or to adjust them to this, producing the present want of harmony. For, after all has been said, it must be recognized that there is a want of harmony between these two different parts of the statute, not, indeed, as originally enacted, but now, as they stand, after amendment. The one section (17) with regard to the effect of a discharge assumes that torts generally are provable and proceeds accordingly; while the other (63) makes no provision for anything of the kind, except by a construction which it is safe to say was not in contemplation when it was passed, and cannot consistently be read into it. The true view to be taken of it has been already indicated. The first of the two paragraphs into which it is divided is given up to an enumeration of the debts which are entitled to be proved against the estate, among which is to be found everything in the way of a fixed obligation, or which, as being of a commercial character, a bankrupt could expect to be relieved from; and, complete in itself, it is not to be added to. The other paragraph plainly has to do with a mere matter of procedure; how unliquidated claims founded upon open account or contract, specified in the preceding paragraph, may be liquidated or settled. Nor can it properly be made to serve any other purpose. Argument may amplify this, but cannot make it clearer. And as so interpreted a claim for damages, such as the one before us, is not included among debts which are made provable. This, if not the latest deliverance of the statute (the amendment of 1903 having to be accorded that position), as the one devoted specifically to the subject, must control. 26 Am. & Eng. Encycl. Law (2d Ed.) 68.

It may be that the conclusion which is so reached, if it is to abridge correlatively the effect of a discharge, is not altogether favorable to the bankrupt, who is interested in being relieved from his liabilities to the fullest extent possible. But this question is not before the court, and it will be time enough to meet it when it is.

There was no error, therefore, in the rejection of the appellants' claim, and the judgment is affirmed.

GRAY, Circuit Judge (concurring). While concurring in the result reached by the majority of the court, and to some extent in the reasoning employed in reaching that result, I am constrained to think that the ratio decidendi of the court below is that upon which our decision should rest. Without attempting to amplify or paraphrase the opinion of the learned judge of that court (In re United Button Co. [D. C.] 140 Fed. 495), it is sufficient, in referring to section 17, to again note that the debts which "a discharge in bankruptcy shall release," are such debts only as are provable under section 63, and the debts which are excepted from discharge, being among others liabilities for certain torts, are also necessarily provable debts. If it be said that "wilful and malicious injuries to the person or property of an-

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other," and "seduction" or "criminal conversation" are torts, pure and simple, and as such incapable of liquidation and proof under section 63, it may be replied that liabilities for such torts, when reduced to judgment, are provable, and come within the classification of section 17a (2) as "liabilities" for certain torts. Be this as it may, it is true, however, that even if, out of abundant caution, certain of the torts which are included in the excepting clause could not have been liquidated and proven under section 63, still the fact that the excepting clause in this respect overlaps provable debts and includes some that are not provable, does not nullify the qualifying effect of the word "provable," as limiting the debts to be excepted, as well as these which are discharged by section 17, and, as said in the majority opinion of this court, cannot serve to abrogate or qualify the description of provable debts as contained in section 63.

In this view, the two sections, 63 and 17, are not necessarily irreconcilable.

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(149 Fed. 54.)

## FISHER v. ZOLLINGER.

(Circuit Court of Appeals, Sixth Circuit. November 22, 1906.)

No. 1,540.

1. BANKRUPTCY—LIENS—CHATTEL MORTGAGE.

Under the law of Ohio relating to chattel mortgages, which governs as to their validity and the rights of the mortgagee in bankruptcy proceedings in that state, a duly recorded mortgage given by a manufacturing corporation to secure bonds, which covers its stock in trade and provides that it may retain possession and sell any of the property in the usual course of its business and use the proceeds until default, is valid as between the parties, and when the mortgagee takes possession, either with the mortgagor's consent or under authority contained in the mortgage, his title becomes complete as against general creditors of the mortgagor; and where such a mortgage was given more than four months prior to the bankruptcy of the mortgagor the taking of possession by the mortgagee within such four months with the consent of the mortgagor and as authorized by the terms of the mortgage, although with knowledge of the mortgagor's insolvency, does not constitute a transfer or preference under Bankr. Act 1898, § 60a, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], as amended in 1903 (32 Stat. 799, c. 487 [U. S. Comp. St. Supp. 1905, p. 689]), since the lien so perfected by the taking of possession relates back to the date of the mortgage.

2. SAME—MORTGAGE ON AFTER-ACQUIRED PROPERTY.

A duly recorded chattel mortgage on after-acquired property under the law of Ohio is valid as between the parties, and becomes a valid lien as of its date as against the mortgagor's general creditors when the property is taken into possession by the mortgagee. Hence such taking possession within four months prior to the mortgagor's bankruptcy does not create a lien nor operate as a preferential transfer within Bankr. Act 1898, § 60a, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], as amended in 1903 (32 Stat. 799, c. 487 [U. S. Comp. St. Supp. 1905, p. 689]).

Appeal from the District Court of the United States for the Western Division of the Northern District of Ohio.

For opinion below, see 140 Fed. 679.

This is an appeal from a decree of the bankruptcy court sustaining the validity of a mortgage made by the bankrupt corporation to secure an issue of

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bonds. The mortgage in question was made by the National Valve Company, a manufacturing corporation organized under the laws of Ohio. The mortgage was made and delivered November 2, 1903. It covered the entire plant, real and personal, and was made to secure an issue of bonds bearing interest coupons maturing semiannually. It provided that the mortgagor might remain in possession and continue business until default in interest or principal, or in taxes or other charges, when the mortgagee might take possession. "That until possession shall be taken * * * upon default as herein provided" the mortgagor "for the proper operation, management and maintenance of the business of said company shall be suffered to possess, manage and enjoy the same with all its property * * * and apply the rents, profits, tolls, income and personal property for the purpose aforesaid and distribute the net annual income to the stockholders of said company, after paying the principal and interest of said bonds according to the terms thereof. * * *" It also contained an after-acquired property clause by which all property, real or personal, thereafter made or acquired should pass under the mortgage. This mortgage was duly filed as a real estate mortgage, and filed and refiled as a chattel mortgage according to the Ohio recording statute. The company remained in possession and operation of its business from execution of this instrument until November 29, 1904, and during that period, with the knowledge and consent of the trustee in the mortgage, sold the product of its manufacture in the ordinary course of its business. During that time additional personal property was acquired, largely with proceeds of the bonds secured by the mortgage, but some part of the price remained unpaid when the trustee took possession of all of the company's property. On May 2, 1904, and again on November 2, 1904, default was made in payment of interest. On November 29, 1904, Zollinger, the trustee under the mortgage, took possession of the entire plant in pursuance of the power contained in the mortgage. On November 30th a petition in involuntary bankruptcy was filed against the mortgagor, and in due course an adjudication followed. By agreement between Zollinger and the trustee in bankruptcy the latter took possession of all of the plant, the rights of the trustee under the mortgage to be transferred to proceeds of the sale. A petition was filed by Zollinger asserting the lien of the mortgage, and an answer by the trustee asserting that it was a fraudulent preference under section 6343, Ohio Statutes, and voidable under sections 60a and 60b of the bankrupt act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), as amended in 1903 (Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. p. 689]). Upon these pleadings and the evidence the referee and upon a petition to review, the district judge held the mortgage valid, both as to the real and personal property, that in existence when the mortgage was executed as well as that subsequently acquired. From this decree, the bankrupt trustee has appealed.

A. B. Thompson, for appellant.

R. K. Ramsey and E. B. King, for appellee.

Before LURTON, SEVERENS and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, announced the opinion of the court.

It was conceded below, and not contradicted here, that the mortgage is a good security as a real estate mortgage. Appellant denies that it is a valid security so far as it operated as a transfer of personal property in existence and possessed by the mortgagor when the mortgage was made, and that, for stronger reasons, it is invalid in so far as it is set up as a security upon personal property acquired subsequent to its execution.

1. As a chattel mortgage of chattels possessed at the date of its execution, it is said that the instrument is invalid, because the mortgagor was left in possession with a power of sale. That the instrument was

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made in good faith to secure an issue of long-time bonds aggregating $40,000, bearing coupons payable semiannually, and that the proceeds of the bonds went mainly to pay for the property, is not disputed. That the transaction was and is free from actual fraud we have no doubt. What, then, is the legal effect of possession by the mortgagor with the power to sell in the usual course of business? This must be settled by the law of Ohio if there is a settled line of decisions in respect of this question. The Ohio rule is clearly stated in the leading case of Francisco v. Ryan, 54 Ohio St. 307, 43 N. E. 1045, 56 Am. St. Rep. 711, where it is said:

"A mortgage on a stock of merchandise, though made in good faith to secure a bona fide debt of the mortgagor, when it allows him to retain possession with a power of sale in the course of his business, is ineffectual to create a lien as against creditors of the mortgagor who assert their rights against the property while it remains under his control; but it is valid between the parties, and when the mortgagee takes possession, either with the consent of the mortgagor given at the time or under an authority conferred by the mortgage, his title becomes complete, and the property is no longer subject to legal process issued against the mortgagor, nor liable for his debts except to the extent of any surplus that may remain after the satisfaction of the mortgage debt and proper charges for enforcing the same."

This statement of the Ohio case is taken from the syllabus, because, under the rule of the Supreme Court of that state, the syllabus contains the authoritative statement of the precise point decided.

No creditor nor any third person had asserted any claim against the personal property covered by this mortgage before the trustee took actual possession under his mortgage. This act of taking possession perfected the lien and made the instrument operative and effective against the world, unless the bankrupt trustee has by virtue of some positive provision of the bankrupt law a right to avoid a mortgage which was good as between the parties and all others who had acquired no intervening rights before the mortgagor took possession. If he has a right to avoid this mortgage under section 60a of the bankrupt law, as a preference made within four months of the filing of the petition in bankruptcy against the mortgagor, it will be because the preference of the mortgage was obtained only when the mortgagee took possession and was not a lien as of the date of the mortgage. But it cannot for a moment be pretended that Zollinger's lien under the mortgage only arose when he took possession. He took possession by virtue of his mortgage, and his lien relates to its date. It was not a lien created when he took possession. The lien upon the chattels conveyed was always good as between the parties. That the property was subject to seizure by the process of creditors, or might pass to a subsequent purchaser, may be conceded. The only effect of taking possession was to cut off the possibility of rights accruing to third persons. The status of Zollinger was identical with that of a mortgagee under an unrecorded chattel mortgage. Until recorded the mortgaged property is subject to seizure by third persons. The lien of such an unrecorded mortgage relates to the date of the instrument, and is not a preference within the meaning of 60a of the bankrupt act, if that date is more than four months antecedent to the filing of a petition in bankruptcy against the mortgagor. Rogers v.

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Page et al., 140 Fed. 596, 72 C. C. A. 164; Humphrey v. Tatman, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956. The effect of the amendment of February 5, 1903, upon such unrecorded instruments we need not here consider.

2. What was the legal effect of the mortgage clause covering after-acquired property? A mortgage upon after-acquired property is perfectly effectual in equity and fastens upon such property so soon as acquired. Pennock et al. v. Coe, 23 How. 117, 16 L. Ed. 436; Dunham v. Cincinnati, etc., Ry. Co., 1 Wall. 254–266, 17 L. Ed. 584; Central Trust Co. v. Kneeland, 138 U. S. 414, 11 Sup. Ct. 357, 34 L. Ed. 1014; Bear Lake, etc., Irrigation Co. v. Garland, 164 U. S. 1–13, 17 Sup. Ct. 7, 41 L. Ed. 327; Harris v. Youngstown Bridge Co. et al., 90 Fed. 322–328, 33 C. C. A. 69; Contracting Co., etc., v. Continental Trust Co., 108 Fed. 1, 47 C. C. A. 143. In Bear Lake Irrigation Co. v. Garland, cited above, it was said:

"Such a mortgage, as against the mortgagor and subsequent incumbrancers, attaches itself to the after-acquired property as fast as it comes into existence, or as fast as the canal or railroad is built, and the lien of the mortgagee is held to be superior to that of the contractor."

Regarded in equity as an executory agreement to give a lien when the property comes into existence or is acquired and therefore enforced as an equitable lien, according to some of the cases, something more is necessary to make such a clause valid as a lien in courts of law.

"This difference," it is said by the Supreme Court of Ohio, in Francisco v. Ryan, 54 Ohio State, 307, 315, 316, 43 N. E. 1045, 1048, 56 Am. St. Rep. 711, "has arisen chiefly from the nature of the jurisdiction exercised by the courts. Those of equitable cognizance applying the maxim that equity regards as done that which ought to be done hold that under such a mortgage a lien attaches to the property as soon as it comes to the mortgagor's ownership. While at law it has been held that it creates no present lien, nor one as the property is acquired, but as between the parties it operates only as a contract for a lien, which may be made effectual for the benefit of the mortgagee by possession lawfully obtained of the property, not only as against the mortgagor himself, but also as against any subsequent legal process issued against him or disposition attempted to be made by him. Whether, or in what instance, in actions under a Civil Code like ours, by which the two systems of remedial justice are blended and administered in the same courts, and often in the same proceeding, the equitable rule should be applied, is a question upon which the courts are not agreed, and one whose decision is not necessary in this case." This reserved question as to whether in the Ohio courts the equitable rule in respect to the effect of an after-acquired property clause might not be enforced as between the parties or the mortgagee and third persons having notice, has not been since decided, and is of importance to the determination of the case in hand. Zollinger took actual possession of the after-acquired property involved here before the rights of any third person had intervened, and, under the Ohio doctrine as enforced in Francisco v. Ryan, this possession had "the same effect of protecting it in his hands from the claims of the

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mortgagor's creditors as has possession taken of the property owned by the mortgagor at the time of the execution of the mortgage."

But the contention of counsel for appellant is that it was this act of "taking possession which created the lien and as this took place on the eve of bankruptcy and at a time when Zollinger knew the National Valve Company was insolvent and could not continue its business." It was therefore a preference obtained or granted within four months preceding the bankruptcy of that company. The whole case must turn here; for, if the preference claimed by Zollinger is not to be attributed to the mortgage as of its date rather than as of the date of this act of taking possession, the decree of the court below must be reversed in so far as Zollinger was permitted to enforce a lien against such after-acquired property. But we cannot assent to the premise of the argument. The lien of Zollinger against the after-acquired property did not arise when he took possession. As to third persons at law it was inchoate. The possession then taken only perfected this incipient lien as against third persons who had not theretofore acquired rights. The question as to whether the lien thus perfected relates to the date of the instrument of mortgage, or to the date when possession was taken, is, in principle, identical with the lien of a mortgage of chattels providing that the mortgagor shall remain in possession with a power of sale, or the lien secured by an unrecorded transfer of property. In both the latter instances the mortgage is a perfectly valid security as between the parties, and voidable only by certain third persons who may acquire rights, in one case before the mortgagee takes possession and in the other before the mortgage goes to record. Neither is there anything in the Ohio decisions that will justify any distinction in principle and prevent the lien from relating to the date of the mortgage which included the contract for the lien. It is true that in Ohio, as in some other jurisdictions, the lien upon after-acquired property is not regarded as valid at law until perfected or completed by possession. Chapman v. Weimer, 4 Ohio St. 481; Francisco v. Ryan, 54 Ohio St. 307, 43 N. E. 1045, 56 Am. St. Rep. 711. In Francisco v. Ryan, the Ohio Court, referring to Chapman v. Weimer, said:

"The principle upon which that case rests is, that the mortgage constitutes a valid and binding contract between the parties, and being so it must be given effect according to the intention of the parties. * * *"

Continuing, the court said of such a mortgage:

It "is a completed contract already obligatory upon the parties, and which continues to be so until it is fully executed, so that in taking possession of the acquired property in pursuance of its provisions, the mortgagee exercises a right belonging to him under the mortgage."

The court quotes with approval from Chase v. Denny, 130 Mass. 568, where it is said:

"If the after-acquired property is taken by the mortgagee into his possession before the intervention of any rights of third persons, he holds it under a valid lien, by the operation of the provisions of the mortgage in regard to it."

Whether the lien of an unrecorded mortgage or a mortgage of chattels where the mortgagor is left in possession with a power of sale

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shall relate to the date of the instrument or to the date when the lien is completed or perfected as against third persons who have acquired no intervening rights before the recording of the instrument or taking possession of the mortgaged chattels is ordinarily of no importance. All persons are cut off by the recording of the instrument or the taking of possession who have not theretofore acquired some right. This is also true as to the relation of the lien of an after-acquired property clause upon such after-acquired property. It is only when some insolvency statute, or some bankrupt law, avoiding preferences obtained within a given time before a general assignment or the filing of a petition in bankruptcy is involved, that the date of a preference under such an instrument becomes important. In neither Chapman v. Weimer nor Francisco v. Ryan, both cited above, was the date of the lien upon the after-acquired property of any importance. Neither was any such question involved in Re Shirley, 112 Fed. 301, 50 C. C. A. 252, or in Re First National Bank of Canton, 135 Fed. 66, 67 C. C. A. 536, and any reference in those cases to the effect of registration as that of a new mortgage was figurative, and not intended to intimate that the lien was only of the date of registration. That the lien of an unrecorded mortgage is not of the date of recording, but is as of the date of the contract for the lien, is well settled. Humphrey v. Tatman, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956; Rogers v. Page et al., 140 Fed. 596, 72 C. C. A. 164. In case of a mortgage upon property to be acquired, as well as in the other instances above referred to, the lien is the lien contracted for by the instrument of mortgage, and there is just as much room for holding that the lien relates to the date of the contract for the lien in the one instance as in the other. There is nothing in Francisco v. Ryan which is antagonistic to this relation of the lien. Upon the contrary, the reasoning of the Ohio court is plainly in line with that of the Vermont court in Peabody v. Landen, 61 Vt. 318, 17 Atl. 781, 15 Am. St. Rep. 903, and Thompson v. Fairbanks, 75 Vt. 361, 369, 56 Atl. 11, 101 Am. St. Rep. 899, where it became necessary to decide the date of the lien, because in one case an insolvency statute which avoided preferences obtained within a short time before a general assignment was involved, and the other the effect of section 60a of the bankrupt act of 1898 avoiding preferences obtained within four months of bankruptcy.

We have referred to this agreement in principle between the case of Francisco v. Ryan and the Vermont cases cited above, because Thompson v. Fairbanks was affirmed by the Supreme Court of the United States, in 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, in so far as the Vermont court held that the taking possession to complete the mortgagee's lien within four months of the mortgagor's bankruptcy was not a conveyance or transfer under the bankrupt act. The Vermont law and the Ohio law are in accord as to the validity of a mortgage upon after-acquired property, when the mortgagee takes possession before the rights of third persons intervene. Thompson v. Fairbanks is a distinct authority for the second proposition, namely, that possession taken under a mortgage is not a preference, although the mortgagee may have known that the mortgagor was insolvent and contemplated bankruptcy. This is the authority upon which this case



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was decided below, and is conceded to be conclusive unless there is some radical difference between the law of Vermont and Ohio in respect to the validity of a mortgage of after-acquired property.

In Thompson v. Fairbanks, 196 U. S. 516, 525, 25 Sup. Ct. 306, 309, 49 L. Ed. 577, it is said:

"Although this after-acquired property was subject to the lien of an attaching or an execution creditor, if perfected before the mortgagee took possession under his mortgage, yet, if there was no such creditor, the enforcement of the lien by taking possession would be legal, even if within the four months provided in the act. There is a distinction between the bald creation of a lien within the four months, and the enforcement of one provided for in a mortgage executed years before the passage of the act, by virtue of which mortgage and because of the condition broken the title to the property becomes vested in the mortgagee, and the subsequent taking possession becomes valid, except as above stated. A trustee in bankruptcy does not in such circumstances occupy the same position as a creditor levying under an execution, or by attachment, and his rights, in this exceptional case, and for the reasons just indicated, are somewhat different from what they are generally stated. Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405."

But it is next argued that Thompson v. Fairbanks was decided before the amendment of February 5, 1903, of section 60a of the bankrupt law, and that this amendment has the effect of destroying the force of that case as an authority. But the amendment bears only upon the matter of liens claimed under unrecorded transfers required by the law of the state where made to be recorded, and makes all preferences under transfers relate, not to the date of the transfer, as was the law before, but to the date of the recording thereof. This matter we fully considered in Loeser, Trustee of Cassie L. Chadwick, v. Savings Deposit Bank & Trust Company (decided at this session) 148 Fed. 975.[1] There is no question here of a lien upon this after-acquired property under an unrecorded mortgage. Zollinger's mortgage, under which he asserts his lien, was duly recorded and expressly provided for the lien asserted below. As that mortgage had been made and recorded more than 12 months before the filing of this petition in bankruptcy against the mortgagor, and as the lien thereby contracted for relates to the date of the mortgage, it is plain that the amendment of section 60a has no effect upon any question here involved.

Decree enforcing lien of Zollinger's mortgage affirmed.

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(149 Fed. 60.)

## NEELY v. WILLIAMS et al.

(Circuit Court of Appeals, Eighth Circuit. October 16, 1906.)

No. 2,355.

1. VENDOR AND PURCHASER—PAYMENT OF PURCHASE MONEY—DEDUCTION FOR BREACH OF COVENANT.

The rule that, where land subject to an incumbrance is sold in parcels successively to different purchasers, the parcels are chargeable in the inverse order of alienation, is applicable in a case where the owner of separate tracts of land devised them together, charged with the payment of annuities, and the devisee sold and conveyed them successively by warranty deeds to different purchasers, and the last grantee who has expended money to obtain a release of the annuities cannot enforce contribu-

[1] 78 C. C. A. 597.

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tion from the prior purchasers, but is entitled under his covenant of warranty to deduct the entire amount so necessarily expended from a deferred payment of purchase money due the grantor.

2 SAME—TENDER SUBJECT TO CONDITION.

A note given for the purchase price of land conveyed with covenants of warranty and against incumbrances, where there are existing incumbrances, is due at maturity only on condition that such incumbrances are removed, and a tender of payment subject to such condition is good and stops the running of interest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 344, 345.]

Hook, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the District of Nebraska.

William Baird and E. S. Durment, for appellant.

J. H. Broady, Sr. (J. H. Broady, Jr., on the brief), for appellees.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This was a bill in equity instituted by Joseph A. Williams and his wife, Annie Williams, to enjoin the prosecution of an action at law brought by the defendant and appellant, Richard M. Neely, to enforce the payment of a promissory note made by the former and held by the latter for $3,500. The note was given by complainants as part payment for a quarter section of land purchased by Mr. Williams from Annie H. Neely, joint residuary legatee with one Richard S. Malony, Jr., under the will of their father Richard S. Malony, Sr. The grantor made a warranty deed to complainant Joseph A. Williams covenanting that the premises were free from incumbrances. That covenant was broken as soon as made because the land was subject to the lien of two annuities created by the devisor in his last will, one in favor of Hannah Blake for $200 and the other in favor of Sarah Foss for $100. After suit was instituted against complainants to recover the balance of the purchase money represented by the note of $3,500 they brought their bill in equity to enjoin the suit until the present worth of the annuities should be ascertained and provision made for their satisfaction. On a former appeal the equities of the case were considered and settled by this court. See Williams v. Neely, 134 Fed. 1, 67 C. C. A. 171, 69 L. R. A. 232, to which reference is made for a more full statement of many incidental facts not necessary now to be specified. The conclusions then reached became the law of this case and must now be recognized as controlling. Guaranty Co. of North America v. Phenix Ins. Co., 59 C. C. A. 376, 124 Fed. 170, 174. They may be briefly summarized as follows: First, that the remedy in equity as invoked by complainants was available to them; second, that Richard M. Neely, the defendant and appellant, who was payee of the note and who took it by some arrangement satisfactory to himself and Annie H. Neely, his mother, the grantor in the deed, took it subject to any defenses which could have been urged against it in the hands of the grantor—in other words, that Richard, for the purposes of this case, stood in the shoes of his mother—third, that a grantee in a deed containing a covenant against incumbrances who has not

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paid the purchase price in full has a choice of two remedies for breach of the warranty, either to pay the balance due and sue the grantor on the covenant against incumbrances or reduce the grantor's recovery for the balance due by the amount of the diminution of the value of the title occasioned by existing incumbrances; fourth, that in a suit by the grantor on a promissory note given for unpaid purchase price of the land which he has covenanted to be free from incumbrances the grantee may plead a defect of title as a failure of consideration of the note in whole or in part.

After reaching and announcing the foregoing conclusions, and as the result of an intimation made at the argument, to the effect that complainants had paid and secured releases of the liens upon their land, this court by Sanborn, Circuit Judge, speaking for it, said:

"In case it shall appear, as counsel have intimated, that since the final hearing below the complainants have paid and secured releases of these liens, the court should reduce the amount of the recovery in the action at law upon the note by the amount not exceeding the value of the annuities at the time such payments were made which the complainants have necessarily expended in paying the liens of the annuities upon their lands and in defending their title against them."

The decree of the lower court was then reversed, with instructions to proceed in conformity with the opinion.

In the light of the law of the case thus declared, the only remaining question for our consideration as conceded by counsel for defendant relates to the amount of credit to which complainants are entitled on their note. This question must be answered by ascertaining how much they necessarily paid to secure a release of their land from the lien of the annuities. There is no substantial doubt that complainants necessarily paid $3,500 for that purpose. An allegation to that effect is made in the supplemental bill filed by complainants after the case was remanded to the court below, to which defendant filed a plea and answer. The plea does not relate to that allegation, and the answer by not denying admits it to be true. Moreover, the proof satisfactorily establishes its truth. We might, therefore, by giving a literal construction to the law of the case as laid down in the former appeal and to the pleadings and undisputed proof now before us, properly affirm the decree below without any further consideration, but some other questions have been ably discussed by counsel to which we feel constrained to give attention. These questions arise out of the following facts: The lien of the annuities in question attached alike to two other quarter sections of land besides the quarter section purchased by Williams from Annie H. Neely. The father of Mrs. Neely died seised of these three quarter sections, and by his will devised them to Annie H. Neely and Richard S. Malony, Jr., creating a charge upon all of them for the payment of the annuities in question. Shortly after his death the devisee, Mrs. Neely, either jointly with Richard S. Malony, Jr., or alone after she had acquired his interest, conveyed the three quarter sections in the following order as to time: First, one to Stanley B. Wilson; second, one to Wenzel Herdlichtka; and, third and last, one to Joseph A. Williams, complainant in this case, executing to each a warranty deed covenanting, amongst other things, against all incumbrances.

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The consideration for each of the conveyances was $6,000. Wilson and Herdlichtka each paid that sum in cash on the delivery of their deeds to them, respectively. Williams paid $2,500 in cash and he and his wife gave their note for $3,500, maturing five years after date, and secured the payment thereof by mortgage upon the quarter section purchased, for the balance of the purchase price. The lien of the annuities attaching as between the annuitants and the successive purchasers to the three quarter sections alike, it was impossible for Williams to release his own without necessarily releasing the land of Wilson and Herdlichtka from the same lien.

The contention is that, because the three quarter sections sold, respectively, to Wilson, Herdlichtka, and Williams were of equal value and equally chargeable with the incumbrance created by the annuities, the complainants were entitled to credit for only one-third of the amount paid in satisfying the annuities, and that the learned trial court should not have charged defendant with that portion of the money paid by complainants which was properly chargeable against the quarter sections of Wilson and Herdlichtka. And the further contention is that on the payment by Williams of the annuities he had a right of contribution from Wilson and Herdlichtka each in the sum of one-third of what he had necessarily paid, on the ground that he had paid off and satisfied a joint obligation imposed upon the three alike, and that, if he did not recover from them, it was his own fault, the consequences of which not being chargeable against Neely.

There are two satisfactory reasons why neither of these contentions are sound:

First. Williams, being the last in point of time to take a conveyance from Mrs. Neely, took title so far as the prior successive purchasers were concerned charged with the payment of the entire debt secured by the lien. The question as to the liability of mortgaged property acquired by successive purchasers of different parcels for the payment of the mortgage debt as between themselves has been the subject of much discussion and of somewhat divergent views. Some of the leading cases holding to liability in the inverse order of alienation are Clowes v. Dickenson, 5 Johns. Ch. (N. Y.) 235; State v. Titus et al., 17 Wis. 241; Root v. Collins, 34 Vt. 173; Deavitt v. Judevine Co., 60 Vt. 695, 17 Atl. 410; Crosby v. Farmers' Bank, 107 Mo. 436, 17 S. W. 1004; Sager v. Tupper, 35 Mich. 134; Cushing v. Ayer. 25 Me. 383; Aiken v. Milwaukee & St. Paul Railway Co., 37 Wis. 4[illegible]; Mahagan v. Mead, 63 N. H. 570, 3 Atl. 919; Mount v. Potts, 23 N. J. Eq. 188; Brown v. Simons, 44 N. H. 475; Hills' Administrator v. McCarter, 27 N. J. Eq. 41. In an exhaustive note to the leading case of Aldrich v. Cooper, White & T. Lead. Cas. Eq. vol. 2, pt. 1, pp. 228, 293, it is said, citing many authorities in support:

"It is well settled in conformity with these decisions that, where land which is subject to the lien of a mortgage or other permanent incumbrance is sold in parcels successively to different persons the buyers are prima facie chargeable in the inverse order of alienation. Such is the established rule in New York and Pennsylvania, and it prevails throughout the greater part of the United States."

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Jones in his work on Mortgages (5th Ed. vol. 2, § 1620) admirably states the reason of the rule as follows:

"This rule rests upon the reason that, where the mortgagor sells a part of the mortgaged premises without reference to the incumbrance, it is right between him and the purchaser that the part still held by the mortgagor shall first be applied to the payment of the debt; and this part is regarded as equitably charged with the payment of the debt. Therefore, when he afterwards sells another portion of that remaining in his possession, the second purchaser simply steps into the shoes of the mortgagor as regards this land, and takes it charged with the payment of the mortgage debt as between him and the purchaser of the first lot; but still, as between the second purchaser and the mortgagor, it is equitable that the land still held by the latter should pay the incumbrance. In this manner the equities apply to successive purchasers. * * *"

In section 1621 the author says:

"These equitable considerations have led to the adoption of the rule that the mortgagee in such case shall sell the mortgaged land in the inverse order of its alienation by the mortgagor; and it will be seen by the cases cited that this rule has been generally adopted."

The opposite view, favoring the discharge of an existing lien by the several successive purchasers of parcels of the land subject to the lien pro rata, finds support in Story's Eq. Juris. § 1233; Barney v. Myers, 28 Iowa, 472; Huff v. Farwell, 67 Iowa, 298, 25 N. W. 252; Green v. Ramage, 18 Ohio, 428, 51 Am. Dec. 458; Burk v. Chrisman, 3 B. Mon. (Ky.) 50; Hall v. Morgan, 79 Mo. 47, and in some other cases.

In this conflict of authorities the case of Savings Bank v. Creswell, 100 U. S. 630, 25 L. Ed. 713, came before the Supreme Court of the United States, where the rule of liability in the inverse order of alienation seems to be finally and authoritatively adopted. In that case Mr. Justice Miller, speaking for the court, after reviewing the English and American authorities and considering the conflicting views of Chancellor Kent in Clowes v. Dickenson, supra, and Mr. Justice Story in his work on Equity Jurisprudence, supra, quotes with approval the argument of Chancellor Kent as follows:

"If there be several purchasers in succession, at different times, I apprehend in that case, also, there is no equality and no contribution as between these purchasers. Thus, for instance, if there be a judgment against a person owning at the time three acres of land, and he sells one acre to A., the two remaining acres are first chargeable in equity with the payment of the judgment debt, as we have already seen, whether the land be in the hands of the debtor himself or his heirs. If he sells another acre to B., the remaining acre is then chargeable in the first instance with the debt as against B., as well as against A., and, if it should prove insufficient, then the acre sold to B. ought to supply the deficiency in preference to the acre sold to A., because, when B. purchased, he took his land chargeable with the debt in the hands of the debtor, in preference to the land already sold to A. In this respect we may say of him, as it is said of the heir, he sits in the seat of his grantor, and must take it with all its equitable burdens."

Mr. Justice Miller then concludes as follows:

"The doctrine and the reason upon which it is founded cannot be better stated than in this extract from the opinion. * * * We are of opinion that the preponderance of authority as shown by judicial decisions, as well as the weight of sound argument, is in favor of the rule laid down by Chancellor Kent."

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A distinction is found in some of the authorities examined on this subject between cases where personal responsibility for the discharge of the lien is devolved upon the owner and cases where the charge, like a rent charge growing out of the land itself, is alone involved. It is claimed that the doctrine subjecting the parcel last conveyed to the payment of the entire lien is applicable only to cases where the debt was the individual obligation of the owner of the land.

Learned counsel for defendants quote from Tiffany on the Modern Law of Real Property (volume 2, p. 1223), as follows:

"Since this doctrine of liability in the inverse order of alienation arises from the obligation of the common grantor, as against the various grantees, to pay off the mortgage, it does not arise when no such obligation exists."

Even if that distinction is sound, which we do not deem necessary to discuss, it is unimportant in this case because the common grantor of the three separate parcels in question as between herself and the successive purchasers had, by her warranty deed, assumed the obligation of protecting them against the lien of the annuities. We see no reason why the principle of liability in the inverse order of alienation applicable as between mortgagor and subsequent successive purchasers should not be applicable to a case like this where a lien is created by the will of the ancestor of the grantor, which, so far as successive purchasers of the land subject to the lien are concerned, the grantor was bound to discharge.

Second. The manifest equity of the situation relieved the lands of Wilson and Herdlichtka from any liability for the discharge of the lien of the annuities. Primarily the duty of securing that discharge rested on the grantor under her covenant against incumbrances. She had received the full purchase price of $6,000 from each of the other two purchasers, Wilson and Herdlichtka, and had received only $2,500 of that price from Williams. He still owed her or her son, the complainant, who stood in her shoes, the sum of $3,500 on account of the purchase price of his land, and had necessarily expended that sum in relieving it from the lien of the annuities. The appropriation of that unpaid purchase money to the discharge of the incumbrance on the land purchased by the three successive purchasers is, in our opinion, a most obvious and equitable disposition of it. Williams, by paying it to release the incumbrance, with his original cash payment of $2,500, paid the exact sum of $6,000 for his land which he agreed to pay, and which Wilson and Herdlichtka agreed to pay and had paid for an unincumbered title to their lands. If Wilson or Herdlichtka should be required to pay any portion of the money needed to pay off the annuities, they would pay correspondingly more than $6,000 which they agreed to pay for a good title, and, if Williams should get any aid from them in paying off the annuities, he would pay less than he agreed to pay for his land. After allowing the $3,500 paid by Williams to be employed in reduction of the sum due on the note, Mrs. Neely has only performed her contract to give all an unincumbered title. The transaction amounts merely to deducting from the purchase price the value of the defect in the title warranted, and in this way the rights of all are recognized and respected and the original contracts performed according to their tenor and effect. Every equitable consideration requires

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that this unpaid portion of the purchase price should be controlled and disposed of so as, if possible, consistently with the rights of all others to protect the lands of Wilson and Herdlichtka from liability by reason of the incumbrance. Wynn v. Carter, 20 Wis. 107, 111.

It follows from what has been said that, as between Williams and Wilson and Herdlichtka, there was no liability on the part of the latter to contribute to the fund required to remove the lien of the annuities, and that the former had no right of contribution against the latter for what he did pay for that purpose. As a necessary consequence the supposed existence of that right does not affect Williams' right, as determined by the former appeal, to diminish the amount of liability on the note by the full amount paid to secure a release of the annuity, and as a further necessary consequence any pretended release of that right by Williams did not deprive defendant of any possible recourse against Wilson or Herdlichtka or otherwise injuriously affect him.

It is insisted by defendant that he is entitled to recover on his note the difference between its face, with interest added, and the amount paid by Williams to secure the release of the annuities. In other words, that he ought to be allowed interest on the Williams note from its maturity to the present time. The note by its terms was payable at the First National Bank of Humbolt, Neb. The evidence shows and the trial court found that complainants upon the maturity of the note deposited the amount due thereon at the bank, with directions to pay the note upon its presentment and upon a proper release of his land from the lien of the annuities, and that it has remained there for defendant's acceptance on the condition imposed. The contention is that the tender, being conditional, was ineffective to stop the running of interest. This is not so. The grantor had failed to convey to Williams the title agreed to be conveyed for the consideration agreed to be taken. It was held on the former appeal that this constituted a failure of consideration for the note, that the covenant in the deed and the promise in the note were mutual and dependent, and that the performance of one was the consideration and condition of the promise of the other. This doctrine necessarily leads to the conclusion that the note was not enforceable as long as the title remained defective. The note was due and payable from Williams only upon a discharge of the lien of the annuities by Neely.

A tender in payment of an unconditional demand must, of course, be unconditional. That is elementary. But the note involved in this case being due conditionally, the tender could be made on like condition, and when so made was good and effective to prevent the running of interest. Comstock v. Lager, 78 Mo. App. 390; Clark v. Weis, 87 Ill. 438, 29 Am. Rep. 60; Wheelock v. Tanner, 39 N. Y. 481; Cass v. Higenbotam, 100 N. Y. 248, 3 N. E. 189; Frenzer v. Dufrene, 58 Neb. 433, 78 N. W. 719; Johnson v. Cranage, 45 Mich. 14, 7 N. W. 188; Kennedy v. Moore, 91 Iowa, 39, 58 N. W. 1066.

These conclusions, without a consideration of several other questions presented in argument and brief, being in harmony with the conclusion reached by the Circuit Court, necessarily lead to an affirmance of its decree. It is accordingly so ordered.

HOOK, Circuit Judge, dissents.

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(149 Fed. 753.)

## THOMAS et al. v. ST. LOUIS & S. F. R. CO.

(Circuit Court of Appeals, Sixth Circuit. January 8, 1907.)

No. 1,561.

1. PATENTS—ACTION FOR INFRINGEMENT—DEMURRER.
   The question of the validity of a patent on its face may be raised by demurrer in an action at law for its infringement.
2. SAME—NOVELTY—CAR TRUSS.
   The Thomas patent, No. 570,148, for a lateral support for the sides and ends of cars, consisting of truss rods extending from the stakes on the outer sides and ends of the car to a plate beneath the car, is void on its face for lack of patentable novelty.

In Error to the Circuit Court of the United States for the Western District of Tennessee.

Greer & Greer, for plaintiffs in error.

G. S. Payson, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was an action to recover damages for the infringement of letters patent No. 570,148, issued to W. A. Thomas, October 27, 1896, for a lateral support for sides and ends of cars. A demurrer to the declaration was sustained upon two grounds: First, because it did not contain certain averments required by section 4886, Rev. St. [U. S. Comp. St. 1901, p. 3382], and, second, because the patent itself upon its face lacked novelty and invention. The object of the invention, as stated in the specification, "is to provide a simple, inexpensive and efficient truss for car sides and ends * * * which, at the same time that it supports the sides against lateral pressure, will act as an anchor to prevent the sides from working upward away from the car floor." The invention itself consists of a truss rod extending from a seat or stirrup attached to the upper end of the stake on the outside of the side or end of the car diagonally downward through the side and bottom frame of the car to a truss plate where it is secured. In other words, it is a U bolt, which, instead of being applied to the lower end of the stake, as usual, is applied higher up, and, instead of extending directly inward, so as to be secured to the side, extends inward and downward, so as to be secured to the bottom of the car, and for this purpose is necessarily lengthened.

There is nothing new in this device. The U bolt applied to stakes on the sides and ends of the cars has been in common use for many years. When lengthened and used as this device is, it becomes a truss or stay which is of as universal and familiar employment as perhaps any known mechanical device. Buildings, bridges, vessels, cars, derricks all use substantially the same appliance, or an appliance performing the same function, as that covered by the Thomas patent. The masts of a vessel are held in place by stays, the timbers of a derrick are supported in the same manner, while trusses hold together the frames of bridges and buildings. This is a matter of such common knowledge that the court below took judicial notice of it, and

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properly held the patent void on demurrer for lack of novelty. The fact that the action was one at law did not place the initial pleading beyond the reach of the demurrer. Brown v. Piper, 91 U. S. 37, 42, 23 L. Ed. 200; Slawson v. Railroad Co., 107 U. S. 649, 652, 2 Sup. Ct. 663, 27 L. Ed. 576; Black Diamond Co. v. Excelsior Co., 156 U. S. 611, 616, 15 Sup. Ct. 482, 39 L. Ed. 553; Richards v. Chase Elevator Co., 158 U. S. 299, 301, 15 Sup. Ct. 831, 39 L. Ed. 991; Richards v. Michigan Cent. R. Co., 102 Fed. 508, 43 C. C. A. 583; Id., 179 U. S. 686, 21 Sup. Ct. 918, 45 L. Ed. 386; Id., 186 U. S. 479, 22 Sup. Ct. 942, 46 L. Ed. 1259; American Fibre Chamois Co. v. Buckskin Fibre Co., 72 Fed. 508, 18 C. C. A. 62; Strom Mfg. Co. v. Weir Frog Co., 83 Fed. 170, 172, 27 C. C. A. 502; Northwood v. Dalzell, etc., Co., 100 Fed. 98, 40 C. C. A. 295; Drake Co. v. Brownell & Co., 123 Fed. 86, 59 C. C. A. 216; Baker v. Duncombe Mfg. Co., 77 C. C. A. 234, 146 Fed. 744.

The judgment is affirmed.

NOTE.—The following is the opinion of McCall, District Judge, on sustaining demurrer:

McCALL, District Judge. This is an action brought by the plaintiffs against the defendant to recover damages for an infringement of certain letters patent, No. 570,148, granted by the United States government to the plaintiffs Ocober 27, 1896, for a period of 17 years, to be used as a new and useful improvement in the lateral support for sides and ends of cars. The plaintiffs claim that, in violation of said letters patent, the defendant company has built, equipped, and does now use, and has used for about five years, railroad cars with a device for the lateral support of their sides and ends which is in all essential and material points identical with and substantially the same device described in the declaration and letters patent, to the damage of plaintiffs in the sum of $25,000, for which they sue. Profert is made by the plaintiff of said original letters patent. To this declaration the defendant interposes a demurrer.

The first cause of demurrer is general, and will be passed.

The second cause of demurrer is special, and states in substance that the declaration does not contain the necessary averment required by section 4886, Rev. St. [U. S. Comp. St. 1901, p. 3382]; that is, there is no averment that the alleged improvement said to be covered by said patent was not known or used by others in this country, and not patented or described in any publication in this or any foreign country before the alleged invention or discovery thereof, and was not in use or on public sale for more than two years prior to the application for said patent, or that it was abandoned. "It has been held in an action for infringement that allegations of the requirements contained in section 4886 (Revised Statutes) prior to the amendment, were necessary and material." Elliott Co. v. Fisher Co. (C. C.) 109 Fed. 330, and cases there cited. I am of the opinion, therefore, that the declaration in this respect is fatally defective, and this cause of demurrer is sustained.

The third cause of demurrer is that the said letters patent No. 570,148, granted to the said Thomas, October 27, 1896, are wholly void on their face for want of patentable novelty and invention. It seems to be usual for patent cases to be disposed of upon bill, answer, and proof, yet "there is no objection," says Mr. Justice Brewer, "if a patent be manifestly invalid upon its face, to the point being raised on demurrer, and the case being determined upon the issue formed." Richards v. Chase Elevator Company, 158 U. S. 299, 15 Sup. Ct. 831, 39 L. Ed. 991, and cases there cited. In examining those cases where this rule is laid down, it appears that most of them, if not all, were cases in equity.

My attention has not been called to any decision holding that a like rule would not hold good in a court of law, and I know of no such holding. Indeed, I can see no valid reason why, if the question of the validity of the patent

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for want of novelty and invention may be determined upon a bill in equity and demurrer thereto, a like practice would not hold good in a court of law.

The question then presented is whether or not the patent in question is in valid for want of novelty and invention. In the letters patent the plaintiff, Thomas, the alleged patentee, declares that what he claims in his patent is a truss seat, a truss rod, a truss plate, used in combination on a gondola or coal car to support the sides and ends of the car attached, and passing down through the bottom of the car, where the ends of the truss rod are secured in a truss plate or washer, and thus to hold the sides and ends of the car from bulging or rising. A careful examination of the model forces me to conclude that there is nothing new in the several parts which compose the device or appliance. What is termed the "truss seat" is a hook projecting from a plate of which the hook is a part, and is familiar to every one who suspends his hammock on his porch, and has been in use from time immemorial. The truss rod is but an elongated U-bolt, made to conform to the parts of the car around which it is looped or bolted. The truss plate is but a piece of flat metal, with two holes to secure the ends of the so-called truss rod. The novelty, if any, consists in the combination and application, and new and useful results thereby accomplished. The arrangement of the different parts in combination is, therefore, the essence of the invention, if it be one.

To any one who has examined an ordinary gondola car, a section of which is illustrated in the brief of counsel for defendant on page 13, and which is copied from Car Builders' Dictionary, 1879, at page 241 and 488, it will appear at once that it is the same combination that we have in the case at bar. The difference in the present case is, the U-bolt is much longer and engages the stake at a point near the top, and the two ends of the U-bolt, instead of passing through the sides of the car and fastening on the inside, passes down the side of the car astride the stake through the bottom, where it passes through a plate and is secured by a nut. This is but a change in degree and the carrying forward of an old idea which is held not to be invention. Smith v. Nichols, 21 Wall. 112, 22 L. Ed. 566; Ansonia Co. v. Electrical Co., 144 U. S. 11, 19, 12 Sup. Ct. 601, 36 L. Ed. 327; Penn. R. R. Co. v. Truck Co., 110 U. S. 490, 4 Sup. Ct. 220, 28 L. Ed. 222.

In Goodyear Rubber Company v. Rubber Wheel Company, 116 Fed. 363, 53 C. C. A. 583, the Circuit Court of Appeals of the Sixth Circuit said: "The bringing together of old parts, allowing each to work out its own effect, without producing some new machine or product, is not invention. A combination of old elements, to be patentable, 'must produce a different force or effect or result, in the combined forces or processes, from that given by their separate parts. There must be a new result produced by the union, if not it is only an aggregation of separate elements.'"—citing Reckendorfer v. Faber, 92 U. S. 347-357, 23 L. Ed. 719. See, also, Lovell Mfg. Co. v. Carey, 147 U. S. 623, 13 Sup. Ct. 472, 37 L. Ed. 307; Capitol Sheet Metal Co. v. Kinnear & Gauger Co., 87 Fed. 333, 31 C. C. A. 3.

I am of the opinion that the patent is void on its face for want of invention, and the demurrer is sustained.

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(147 Fed. 463.)

## McCLAUGHRY et al. v. KING.

(Circuit Court of Appeals, Eighth Circuit. June 23, 1906.)

No. 2,315.

REWARDS—OFFER AND ACCEPTANCE.

Where defendant, as sheriff of a county, offered a reward "for the arrest of each of the parties convicted" of a certain bank robbery and murder, the reward was not accepted merely by the giving of information concerning the whereabouts of the suspect, but could only be accepted by the party assuming the personal danger and responsibility of either actually arresting the suspect or causing some other person to arrest him.[1]

Hook, Circuit Judge, dissenting.

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[1] See note at end of case.

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In Error to the Circuit Court of the United States for the Western District of Arkansas.

For opinion below, see 135 Fed. 195.

Cravens & Cravens, A. C. Cunkle, and Arthur M. Jackson, for plaintiffs in error.

Cravens & Covington, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. The petition filed below shows that the defendant, who was sheriff of Johnson county, Ark., on the occasion of the robbery of a bank and murder of one Powers in that county, offered a reward of $2,750 "for the arrest of each of the parties convicted of such bank robbery and said murder"; that thereafter plaintiffs discovered that one West had been arrested by the police force of Evansville, Ind., for vagrancy, and, being informed that he was suspected of being guilty of the Johnson county robbery and murder, and knowing that the reward of $2,750 had been offered for his arrest, notified defendant that West was under arrest in Evansville under an assumed name of Charles Johnson; that defendant, acting upon that information, immediately went to Evansville, apprehended West, and took him back to Johnson county, where he was subsequently tried, convicted, and executed for the crime of murdering Powers; that plaintiffs, at the request of defendant, furnished evidence which largely contributed to the conviction of West. A demurrer interposed to this petition on the ground that it failed to state facts sufficient to constitute a cause of action was sustained, and, plaintiffs declining to plead further, final judgment was rendered in favor of defendant.

Was the ruling on the demurrer right?

A reward offered for the arrest of an offender is an offer or conditional promise to pay the person performing the required service a certain sum of money. The performance of the service is the acceptance of the offer, or performance of the condition on which the promise is made, and, when done, concludes a binding contract. The matter rests exclusively in the domain of contract, involving an offer and its acceptance. One desiring to offer a reward may fix his own terms and conditions. If they are satisfactory they must, like other propositions, be accepted as made. If unsatisfactory no one need accept them. The offer may be, and doubtless is, made according to the kind of service required. If the apprehension of a desperate character be required it would naturally be made to persons who would brave the danger and assume the responsibility, either of making the arrest or causing it to be made. If, on the other hand, the apprehension of a different character is desired, personal bravery and responsibility might not be as much required as diplomacy, and the offer would naturally be addressed to one who would work up clues and give information.

From considerations like these we well understand how an interested party may discriminate in the proposition he makes. It is obviously one thing to offer a reward for an arrest which involves dan-

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ger and responsibility and quite a different thing to offer a reward for information which involves neither. The brave and strong of purpose only would naturally undertake the former, while the timorous and conservative might undertake the latter. One accepting the first offer would actually make the arrest or cause it to be made, while one accepting the other offer might do the equally efficacious act, and the arrest might follow as a consequence and he not be subjected to any personal danger or responsibility. The difference in the offer as well as the difference in the performance clearly shows that the two make different contracts. This is recognized and affirmed in the case of Shuey v. United States, 92 U. S. 73, 23 L. Ed. 697. The Secretary of War had offered one reward of $25,000 "for the apprehension of John H. Surratt," charged with being one of Booth's accomplices in the murder of President Lincoln, and at the same time announced that "liberal rewards will be paid for any information that shall conduce to the arrest" of Surratt. The trial court found that the claimant gave information which conduced to the arrest of Surratt, but that it did not constitute an "arrest" of him within the meaning of the offer. Mr. Justice Strong, in delivering the opinion of the court, says:

"It is found as a fact that the arrest was not made by the claimant, through the discovery and arrest were due entirely to the disclosures made by him. The plain meaning of this is that Surratt's apprehension was a consequence of the disclosures made. But the consequence of a man's act are not his acts. Between the consequence and the disclosure that leads to it there may be, and in this case there were, intermediate agencies. Other persons than the claimant made the arrest—persons who were not his agents," etc.

The following authorities are in harmony with the foregoing views and sustain the contention that furnishing information merely which leads to an arrest is not the acceptance of an offer of a reward for making the arrest: Kinn v. First Nat. Bank, 118 Wis. 537, 95 N. W. 969, 99 Am. St. Rep. 1012; Juniata County v. McDonald, 122 Pa. 115, 15 Atl. 696; Everman v. Hyman, 3 Ind. App. 459, 29 N. E. 1140; Williams v. West Chicago St. R. Co., 191 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278; Lovejoy v. Atchison, Topeka & S. F. R. R., 53 Mo. App. 386. The following authorities are relied on to sustain the contrary: Crawshaw v. City of Roxbury, 7 Gray (Mass.) 374; Besse v. Dyer, et al., 9 Allen (Mass.) 151, 85 Am. Dec. 747; First National Bank v. Hart, 55 Ill. 62; Haskell v. Davidson, 91 Me. 488, 40 Atl. 330, 42 L. R. A. 155, 64 Am. St. Rep. 254; Ralls County v. Stephens, 104 Mo. App. 115, 78 S. W. 291. These cases have been carefully examined and considered and the principle of decision will be briefly stated.

In the Crawshaw Case a reward was offered by the city of Roxbury "for the apprehension and conviction" of any person who shall set fire to any dwelling house. A fire was subsequently set by an incendiary. Plaintiff, Crawshaw, was at the fire, sought out three police officers of the city, and requested one of them to arrest one Clarke, whom he pointed out as the incendiary. Thereupon the officer was

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induced to and did arrest Clarke. The foregoing facts make it appear that Crawshaw made the officer his agent for making the arrest, and that in doing so the officer acted under the directions of Crawshaw. Some expressions are found in the charge of the court to the jury which obviously were made in the light of the facts just referred to and should be construed accordingly. Chief Justice Shaw, in announcing the opinion of the Supreme Court, disposes of the case on other grounds, and makes no reference, except to generally approve of the law as laid down in the charge, to the point now under consideration. In the Besse Case the doctrine of the Crawshaw Case is approved; emphasis being laid upon the fact that the incendiary was arrested by the officer at the request of Crawshaw. In the First National Bank Case the reward was given to the claimant because his services were accepted and availed of by the persons offering the reward after he had informed them that he would claim the reward if he performed the services. The court held that, although the claimant was not embraced in the description of the persons to whom the reward was first offered, he was entitled to it by reason of the subsequent engagement made between the parties. In the Ralls County Case it distinctly appeared that the claimant directed an officer to arrest the suspected criminal, and the court there says that, although the officer was the first to lay hands on the suspect, "he did so as the agent, or, one may say, the arm of Stephens. He acted entirely for Stephens and by the latter's direction."

The foregoing cases practically announce the doctrine that, where a reward is offered for the arrest of a suspect, any person who either personally makes the arrest or induces another to act for him, as his agent, in so doing, is entitled to the reward. Concerning this doctrine there can be no difference of view. The only other case relied upon by counsel for plaintiffs is that of Haskell v. Davidson. That case contains expressions favorable to their view, but it is founded upon a state of facts which permit of a recovery on principles not out of harmony with those already stated. The defendant in that case had offered a reward "for the arrest and conviction of the person or persons who entered the room of Alexander Wilson and stole $35 therefrom." The plaintiffs were informed of this offer and were thereby induced to enter upon an investigation of the crime. They discovered facts and circumstances strongly inculpating one Thompson, who was found and confronted with the charge by the plaintiffs, and thereupon made a full confession of his guilt to them and subsequently pleaded guilty to the indictment found against him by the grand jury. The arrest was but a matter of form, and was made by a deputy sheriff, who made no claim for the reward. It is in the light of such facts that the court says:

> "The service contemplated by a person making such an offer, and which the proposal should be construed as meaning, must be the obtaining and giving to some proper person interested sufficient information in relation to the perpetrator of the crime and his whereabouts as to authorize and secure the arrest of the offender, and subsequently to procure his conviction by a court of competent jurisdiction."

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Disconnected with the peculiar facts of that case, we doubt that the learned court would have announced the principle quite as broadly as it did.

Applying well recognized rules governing the interpretation of contracts, and the reasoning indulged, and authorities considered, we think the true rule is that when an offer of a reward is made for an "arrest" of a suspect it is not accepted by the giving of information merely, concerning the whereabouts of the suspect, but is accepted only when one assumes the personal danger and responsibility of either actually arresting the suspect or causing some other person to arrest him. The petition in this case fails to make such averments and was for that reason fatally defective.

The judgment is affirmed.

HOOK, Circuit Judge (dissenting). The offer of a reward and its acceptance by the performance of the service is a contract, but it is not different from other contracts in respect of the rules of construction that should be applied. In such contracts, as in others, regard should not be had to the mere letter to the exclusion of the spirit. "The fruit and profit of a nut lie in the kernel, and not in the shell." It matters not that the proponent of the reward is entitled to make his own terms. When he has done so it is then for the court to say what they mean and whether they were substantially complied with, and in doing so it is not unjust to him to deprive him of a shrewd, narrow meaning of his own words.

The reward offered was for the arrest of each one of the parties guilty of a robbery and murder in Arkansas. A man named West was suspected. The plaintiffs discovered that under an assumed name he was under arrest in Evansville, Ind., for vagrancy and street begging. His identity was unknown to the police of that city, and his identity and whereabouts were unknown to the Arkansas sheriff who offered the reward. Had not the plaintiffs acted he would have served his time at Evansville and disappeared. In this condition of affairs the plaintiffs, knowing of the reward and alone knowing of the identity and whereabouts of the accused, immediately notified the sheriff, who, acting thereon, at once went to Evansville, took him into custody, and removed him to Arkansas, where, with the assistance of plaintiffs, he was convicted and afterwards executed. It does not appear that any one else than plaintiffs is claiming the reward. The Evansville police would not be entitled to it because what they did was in the mere performance of other duties and had no relation to the Arkansas crime or to the reward. The sheriff himself would not be entitled to it because his receiving possession from the police was a mere perfunctory service performed after receipt of the important and necessary information from the plaintiffs. The man was already under arrest. He was where any one who knew his identity could get him. It is not as if he had been at large. True, it may be said that he was not under arrest for the Arkansas crime until the sheriff arrived, but it seems to me to be quite a narrow construction to say that by

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simply laying a hand upon the accused and peacefully receiving him from the police the sheriff himself made the arrest and thereby escaped paying the reward he offered. Even if so narrow a meaning is to be given to the word "arrest," there is still reason for holding that when the sheriff went to Indiana he went for the plaintiffs and waived the personal performance of that unimportant service by them, since all that was vital and of consequence had already been done. The better rule is that he who is the active and efficient cause in securing the result described in an offer of reward is the one who is entitled to it. He is the one who accomplishes the result—who brings it about. It is not the man who, when all else is done and when the accused is as it were tied to a stake, merely performs the letter of the final act without effort, skill, or enterprise. Such rule would conform to the spirit that actuated the offer of reward, and if it does it is the one that should prevail.

I think that the Massachusetts rule expressed in Crawshaw v. City of Roxbury, 7 Gray (Mass.) 374, and that of Maine, shown in Haskell v. Davidson, 91 Me. 488, 40 Atl. 330, 42 L. R. A. 155, 64 Am. St. Rep. 254, is the reasonable one and is in harmony with those applied to contracts generally. In the Roxbury Case the reward was "for the apprehension and conviction of any person or persons who shall set fire to any dwelling house," etc. Thereafter a building was set on fire by an incendiary and consumed. The plaintiff was at the fire and sought out three police officers and requested them to arrest one Clarke for having set the fire. He pointed Clarke out to one of the officers and stated facts and circumstances tending to show that Clarke committed the offense. Clarke was arrested by this officer upon the information given and afterwards confessed to him. Another police officer made the complaint. Clarke pleaded not guilty at the trial, but was convicted upon the testimony of the officers. The plaintiff's information upon which he accused Clarke and requested his arrest was hearsay, and therefore he was not summoned to attend the trial. The city having refused to pay the reward, the plaintiff brought action therefor, and having recovered a judgment the city took the cause to the Supreme Judicial Court of Massachusetts, where it was affirmed. At the trial below the court instructed the jury as follows:

"That the offer of a reward could not be taken literally, for, as the conviction must be in due course of law, requiring the intervention of the court and jury, a person might be entitled to the reward by becoming the prosecutor, and, as such, causing the arrest, and conducting the case to a conviction, or he might be entitled to it by giving information which should lead to and produce the arrest and conviction of the offender; that is, by giving such information to the city government of Roxbury, or to some officer authorized to act for them in making the arrest and prosecuting the offender to conviction upon the information so given, that, in this case, the officers of the city having instituted and carried on the prosecution to conviction after the arrest, if the jury were satisfied that the facts disclosed by the plaintiff were such as induced the officer who arrested the offender to arrest him, and were material, and had a tendency to produce ultimate conviction, and without them Clarke would not have been convicted, unless upon his own subsequent confession of guilt the plaintiff would be

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entitled to the reward; and the fact that Clarke, subsequently to the disclosure of such information, made by the plaintiff, and upon which he was arrested, confessed his guilt, would not deprive the plaintiff of the right to recover, though Clarke's confession of guilt was produced in evidence upon his trial, and might have been the ground upon which he was convicted."

Upon appeal Chief Justice Shaw observed of this and other instructions:

"The court are of opinion that the directions of the judge on the trial were correct in law, carefully guarded, and were adapted to the evidence before the jury."

In Haskell v. Davidson the reward offered was "for the arrest and conviction of the person or persons who entered the room of Alexander Wilson and stole $35 therefrom." The plaintiffs, being informed of the offer, commenced an investigation of the crime, with the result that facts and circumstances were discovered tending strongly to inculpate one Thompson, who, upon being found and confronted with the charge by the plaintiffs, made a confession of his guilt and subsequently pleaded guilty to an indictment found by the grand jury. The formal arrest of Thompson, however, was on a capias issued by the court and was made by a deputy sheriff. The Supreme Judicial Court of Maine sustained a recovery by the plaintiffs. It said:

"An offer of reward is a proposal. The party making it may insert his own terms, and no person can become entitled to the reward without a performance of all of the terms contained in the proposal. But such performance need not be a literal compliance with the terms of the offer. It is sufficient if the party claiming the reward has substantially performed the service required by the proposal. An offer of a reward for the 'arrest and conviction' of an offender cannot be taken literally. The person who by reason of the offer is induced to make an investigation, and finally obtains possession of sufficient facts to authorize the arrest of an offender, and, his subsequent conviction, for the crime referred to in the offer, certainly cannot himself convict the offender. The service contemplated by a person making such an offer, and which the proposal should be construed as meaning, must be the obtaining, and giving to some proper person interested, sufficient information in relation to the perpetrator of the crime, and his whereabouts, as to authorize and secure the arrest of the offender, and subsequently to procure his conviction by a court of competent jurisdiction."

The case of Shuey v. United States, 92 U. S. 73, 23 L. Ed. 697, is not in point, because it appeared from the face of the proclamation of reward by the Secretary of War that he made a clear distinction between the apprehension of Surratt on the one hand and information conducing to the arrest on the other. It was his privilege to do so. The sum of $25,000 was offered expressly for the apprehension, and it was specified in addition that "liberal rewards will be paid for any information that shall conduce to the arrest," etc. The claimant gave information, but other agencies effected the arrest. It is obvious that a man who asked and received a reward for information under such an offer should not also be rewarded for the apprehension of the fugitive by others. This feature of the case was particularly adverted to by the Supreme Court. I think the plaintiffs here fairly earned the reward offered and should receive it.



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## NOTE.

### Performance of Conditions in and Acceptance of Offer of Reward.

#### I. In General.

[a] (U. S. 1896) A criminal, for whose arrest defendants had offered a reward, was wounded and disabled by a private searching party, one of whom kept watch over him, but did not actually seize him. A deputy sheriff afterwards arrived and formally arrested him. On the day after the arrest the deputy stated to an agent of defendants that only those who made the fight were entitled to the reward, and that he himself would not claim any part of it. Thereupon the entire amount was paid to the searching party. *Held*, that the deputy was estopped from thereafter claiming the reward for himself.—Witty v. Southern Pac. Co. (C. C.) 76 Fed. 217.

[b] (U. S. 1896) Three men, in search of certain criminals for whose arrest a reward had been offered, fired upon and wounded one of them, who was concealed behind a pile of straw, so that the extent of his injuries was unknown. One of the attacking party, being also wounded, was conveyed to a distant town by another, who returned next morning, accompanied by a deputy sheriff and others. The third member of the original party remained on watch near the straw pile, all night, to prevent the criminal's escape. The deputy sheriff, with other persons, approached the straw pile, and, finding the wounded man utterly incapable of offering the least resistance, formally arrested him. *Held*, that the arrest was in fact effected before the deputy's arrival, and the latter was not entitled to claim the reward.—Witty v. Southern Pac. Co. (C. C.) 76 Fed. 217.

[c] (U. S. 1900) Where an arrest is made 10 years after the offer of a reward, the person for whom the reward is offered being still a fugitive from justice, the person making the arrest is entitled to the reward.—Drummond v. United States, 35 Ct. Cl. 356.

[d] (Ark. 1884) One who offers a reward may annex such conditions as he chooses, and one claiming the reward must prove a compliance with them.—Amis v. Conner, 43 Ark. 337.

[e] (Cal. 1896) One who receives compensation from a water company for reporting a pollution of its source of supply, and the offender's identity, in compliance with the company's request for such information, cannot afterwards procure the offender's conviction, and claim a reward offered "for the arrest and conviction" of such offenders, since the reward cannot be apportioned, and acceptance of pay for the detection defeats a recovery for the conviction.—Van Horn v. Ricks Water Co., 115 Cal. 448, 47 Pac. 361.

[f] (Conn. 1841) The authorities of a city offered a reward of $500 to the person who might discover and bring to conviction any person who had been guilty of setting fire to any building destroyed in the city within a certain time past, and a like reward for the detection and conviction of any person who should thereafter be guilty of a like offense. After such offer, a shop in the city was set on fire by S.; but the fire went out, shortly after it was set, without doing any other damage than charring some portion of the shop. On the information of G., S. was convicted of such offense. In an action by G. against the city to recover the reward offered, *held*, that by a fair construction of the first clause of the contract plaintiff, in order to entitle himself to the reward, must have discovered and brought to conviction a person guilty of setting fire, not only to a building, but to a building destroyed.—Gardner v. City of Hartford, 14 Conn. 195.

[g] (Ill. 1842) Rewards were offered for the discovery of the robber of a bank—one for the detection of the person, and the other for the recovery of the money stolen. After the publication of the offer the president of the bank ascertained, by conversation with the robber, who committed the robbery, and recovered from him the greater part of the money. The president promised him he would not disclose the evidence of his guilt to any person, except the president of the branch bank where the robbery had been committed, unless required to make such disclosure before a court of justice; and he did not

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disclose the fact until after the arrest of the robber. One of the directors of the branch bank subsequently made affidavit charging the robber with the crime, on which a warrant was issued and the robber arrested and committed to jail, from which he escaped without a trial. Before he made the affidavit the fact of the recovery of the money was known to the directors and several others, and the citizens of the town were generally aware of the fact. *Held*, that the president of the bank discovered the robber, and that the director did not, and that he was not entitled to any portion of the reward.—Stacy v. State Bank, 5 Ill. (4 Scam.) 91.

[h] (Ill. 1870) Where a person, acting under an offer of reward, acquires a knowledge of the facts necessary to a detection or discovery of a criminal, and of thing stolen or lost, and has imparted such knowledge with the intent and for the purpose of bringing about a recovery or restoration of the property and the arrest and conviction of the criminal, taking on himself the risk and consequences of a failure, if it fails, and acting with a view to the benefit of the reward if his suspicions and disclosures are well founded and successful, he is entitled to the reward offered.—First Nat. Bank v. Hart, 55 Ill. 62.

[i] (Ill. 1897) A robbed bank offered a reward for the robbers, and a railroad conductor and baggageman furnished a description of them. Two policemen of a neighboring city arrested them without knowledge of the reward or robbery, and their chief advertised their arrest as having burglars' tools on them. The bank sent him descriptions of the men wanted, and he answered that he had them. The railroad men identified them, and conviction followed. *Held*, that the chief of police, the conductor, and the baggageman were entitled to the reward, rather than the policemen who made the arrest.—Ensminger v. Horn, 70 Ill. App. 605.

[j] (Ill. 1902) In the case of an offered reward for the doing of a certain thing, the act of one who, knowing of this, performs the condition, creates a contract. The performance constitutes both acceptance and fulfillment.—Van Vlissingen v. Manning, 105 Ill. App. 255.

[k] (Ind. 1861) It is not necessary that notice should be given to the party offering a reward that his offer is being acted on.—Harson v. Pike, 16 Ind. 140.

[l] (Ky. 1871) A reward cannot be claimed by any person, unless it shall turn out that the party arrested was legally liable to be so taken into custody, or unless the person making the arrest acted in good faith, having reasonable grounds for believing that he was but discharging a duty which every good citizen owes to the public.—Marking v. Needy, 71 Ky. (8 Bush) 22.

[m] (Ky. 1896) One's right to a reward offered by the Governor under St. § 1932, for apprehension and delivery of a fugitive from justice, is not affected by the fact that the apprehension was prior to the offer, the delivery to the county officer not being made till after the offer.—Coffey v. Commonwealth (Ky.) 37 S. W. 575.

[n] (Ky. 1904) Where a detective, on learning of an offer of a reward from the Governor for the arrest of a man charged with murder, sought out the alleged murderer, and procured another officer to make the arrest, under contract by which the officer was to be paid a certain sum and expenses therefor, the latter cannot repudiate the contract on the ground that the detective concealed from him the amount of the reward and the fact that it had been offered by the Governor, in the absence of evidence that he demanded to know the amount or the source from which the reward emanated.—Heather v. Thompson, 78 S. W. 194, 25 Ky. Law Rep. 1554.

[o] (La. 1870) A reward of $5,000 was offered by certain insurance companies for such testimony as would convict any person guilty of the crime of incendiarism. Two persons were imprisoned for arson before the publication of the reward. Before the trial, plaintiff collected such testimony as led to their conviction. *Held*, that the reward was demandable on producing the necessary evidence, whether the crime had been committed before or after the publication.—Salbadore v. Crescent Mut. Ins. Co., 22 La. Ann. 338.

[p] (Md. 1868) An action for a reward for the arrest and return of runaway slaves cannot be maintained, if at the time the arrest was made the slaves were returning to their master, of which facts the plaintiffs were aware. —Goldsborough v. Cradie, 28 Md. 477.

[q] (Mo. 1904) Where a reward was offered for the apprehension of a mur-

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derer, one who made several trips at his own expense to find the criminal, and finally found him and secured his arrest and prosecution, which resulted in his conviction, accepted the offer, and is entitled to the reward.—Cummings v. Clinton County, 181 Mo. 162, 79 S. W. 1127.

[r] (Mo. 1905) The fact that the claimant of a reward offered by the county court for the apprehension of a felon, pursuant to Rev. St. 1899, § 2474 [Ann. St. 1906, p. 1485], was paid his witness fees for attending and testifying at the trial, does not preclude him from recovering the reward.—Smith v. Vernon County, 188 Mo. 501, 87 S. W. 949, 70 L. R. A. 59, 107 Am. St. Rep. 324.

[s] (Neb. 1900) In a controversy over the right to a reward for the recovery of a dead body, whether a person acted independently of others and on his individual account, or whether the discovery was the result of the joint action and combined efforts of several, is a question of fact, to be tried as all other controverted questions of fact.—Elkhorn Valley Lodge, No. 57, I. O. O. F. v. Hudson, 59 Neb. 672, 81 N. W. 859.

[t] (Neb. 1900) Where many persons are engaged in the search for a dead body, for the recovery of which a reward is offered, and one acting on his own account, independent of the others, and for the purpose of securing the reward, succeeds in finding the missing body, he will be entitled to the whole of such reward.—Elkhorn Valley Lodge, No. 57, I. O. O. F. v. Hudson, 59 Neb. 672, 81 N. W. 859.

[u] (N. H. 1881) The statute in relation to rewards for the detection of crime authorizes compensation only for what is done after the reward is offered.—Abel v. Pembroke, 61 N. H. 357.

[v] (N. Y. 1853) A reward of $5,000 was offered for the arrest of a man who had obtained a large sum by forgeries and the recovery of the money, or a proportionate amount for any part thereof. *Held*, that neither the arrest of the forger alone, nor the recovery of the money, or any part of it, alone, came within the terms of the offer.—Jones v. Phœnix Bank, 8 N. Y. (4 Seld.) 228.

[w] (N. Y. 1856) A reward was offered for the "detection" of a thief, and the party claiming the reward gave information on which a person was arrested. *Held* sufficient to entitle him to the reward, in the absence of testimony showing that the charge was unfounded.—Brennan v. Haff, 1 Hilt. 151.

[x] (Pa.) Under Act March 15, 1821, providing for a reward for the apprehension of a person who shall have stolen any "mare, horse or gelding," a person apprehending a person who has stolen a mule is not entitled to the reward.—(1874) Commonwealth v. Edwards, 10 Phila. 215, 31 Leg. Int. 358; (1894) Commonwealth v. Davidson (Quart. Sess.) 4 Pa. Dist. R. 172.

[y] (Pa. 1886) While the general rule is that, to entitle a person to a reward, he must show rendition of the services required after a knowledge of, and with a view of obtaining, the reward, if the party offering the reward sees fit to waive this rule, and pay it to a person who has assisted in securing that for which the reward is offered, other persons not legally entitled to the reward have no right to complain.—Fink v. Myres, 4 Kulp, 145.

[z] (Wis. 1882) Defendant offered to give $5,000 to any one who would bring the body of his wife from a burning building, dead or alive. Plaintiff, a paid member of the fire department, on the faith of the offer, and at great personal peril, but without notice of acceptance of the offer, brought the dead body from the building. *Held*, that he was entitled to the reward.—Reif v. Paige, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731.

II. Knowledge or Ignorance of Offer and Intention of Making Claim.

[a] (U. S. 1900) Where a promise by a public officer is general to any one who shall make an arrest within the time provided by law for the prosecution of an offender, and the conditions are complied with, a recovery cannot be defeated on the ground that the party making the arrest had no knowledge of the rewards, as his motive in making the arrest cannot be inquired into.—Drummond v. United States, 35 Ct. Cl. 356.

[b] (Cal. 1880) One cannot recover a reward, where his acts were performed with knowledge of the offer of a reward, but without any intention of claiming it.—Hewitt v. Anderson, 56 Cal. 476, 38 Am. Rep. 65.

[c] (Conn. 1870) A person who recovers stolen property, for the recapture

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of which a reward is offered, who, not knowing the reward to have been offered, accepts a less sum than that named in compensation for his services, cannot afterwards claim the specified reward.—Marvin v. Treat, 37 Conn. 96, 9 Am. Rep. 307.

[d] (Del. 1871) One who has found and returned to the owner goods, for the return of which a reward has been offered, is entitled to recover the reward, although at the time the goods were returned he did not know that a reward had been offered.—Eagle v. Smith, 4 Houst. 293.

[e] (Ill. 1885) To entitle a person to a reward, he must show a rendition of the services required after the knowledge of, and with a view of obtaining, the reward offered.—Chicago & A. R. Co. v. Sebring, 16 Ill. App. (16 Bradw.) 181.

[f] (Ill. 1901) Where plaintiff's information leading to the conviction of certain persons charged with a murder was given before he knew of the offer of a reward for the conviction of the murderers, he is not entitled to the reward. Judgment, 94 Ill. App. 385, affirmed.—Williams v. West Chicago St. R. Co., 191 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278.

[g] (Ind. 1891) A person who has captured a thief for whose apprehension a reward has been offered is entitled to the reward, although he made the capture without knowledge of the offer.—Everman v. Hyman, 26 Ind. App. 165, 28 N. E. 1022, 84 Am. St. Rep. 284.

[h] (Ky. 1873) A person apprehending and delivering up a fugitive from justice is entitled to recover the reward offered therefor by the governor, although he was not aware of the offer.—Auditor v. Ballard, 72 Ky. (9 Bush) 572, 15 Am. Rep. 728.

[i] (Mo. 1905) One who apprehends a felon before the offer of a reward, and delivers him over to the proper authorities without knowledge of or reliance on the reward, is not entitled to such reward.—Smith v. Vernon County, 188 Mo. 501, 87 S. W. 949, 70 L. R. A. 59, 107 Am. St. Rep. 324.

[j] (N. Y. 1868) A person is not entitled to a reward, offered to those who will give such information as shall lead to the apprehension of a murderer, because of information given before he knew that the reward was offered.—Fitch v. Snedaker, 38 N. Y. 248, 97 Am. Dec. 791.

[k] (N. Y. 1873) To entitle a person to a reward offered for the recovery, or for information leading to the recovery, of property lost, he must show a rendering of the services required after a knowledge of, and with a view of obtaining, the offered reward. The finding of the property and advertisement thereof, without knowledge of the offer, does not entitle one to the reward.—Howland v. Lounds, 51 N. Y. 604, 10 Am. Rep. 654.

[l] (N. D. 1905) To entitle one to recover a reward he must show rendition of services required in the offer after knowledge of and with a view to obtain the reward.—Couch v. State, 103 N. W. 942.

[m] (Tenn. 1845) To entitle one who apprehends a felon to a reward, it is necessary that he should act on the knowledge that a reward had been offered, and with a view to obtain it.—Stamper v. Temple, 25 Tenn. (6 Humph.) 113, 44 Am. Dec. 296.

### III. Apprehension, Arrest, and Conviction.

[a] (U. S. 1897) A reward offered for an offender belongs jointly to a regular deputy and a special deputy who together made the arrest.—Matthews v. United States, 32 Ct. Cl. 123.

[b] (Ala. 1849) The person apprehending a runaway slave is entitled to the reward prescribed by the statute as soon as he carries him before a justice of the peace.—Drew v. Ricks, 17 Ala. 25.

[c] (Ill. 1877) When a county offers a reward for the pursuit and arrest beyond the limits of the county of any person guilty of stealing a horse within the county from a citizen thereof, to be paid on the conviction of the thief, the pursuit of the thief to another state, under a warrant for his apprehension and the requisition of the Governor of the state upon the Governor of such other state, and bringing the thief back under such warrant, and his conviction, will entitle the person procuring the same to be done to the reward, notwithstanding such thief may have been apprehended and detained in such other state by officers there.—Montgomery County v. Robinson, 85 Ill. 174.

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[d] (Ky. 1875) A recovery may be had of rewards offered for the apprehension and conviction of criminals, although the conviction has been prevented by a dismissal of the indictments at the request of attorneys employed by the company which offered the rewards; the accused being wanted as witnesses against others.—Louisville & N. R. Co. v. Goodnight, 73 Ky. (10 Bush) 552, 19 Am. Rep. 80.

[e] (Ky. 1881) The fact that the accused was induced to surrender by persuasion, and not by personal force, does not deprive the person to whom the surrender was made of the right to the reward offered for the accused's arrest; there being no evidence of collusion or fraud.—Hogg v. Commonwealth, 3 Ky. Law Rep. 470.

[f] (Ky. 1899) To entitle one to a reward offered for the arrest and conviction of an offender, it is not necessary that he should personally and alone make the arrest, he being entitled to the assistance of the arresting officers of the county.—Stone v. Wickliffe, 106 Ky. 252, 50 S. W. 44.

[g] (Ky. 1899) To entitle one to a reward offered for the "arrest and conviction" of an "unknown" offender, there must be a final conviction; and therefore the fact that an appeal is pending from a judgment of conviction is sufficient to defeat a claim for the reward.—Stone v. Wickliffe, 106 Ky. 252, 50 S. W. 44.

[h] (Ky. 1900) Plaintiff is entitled to a reward offered by the Governor for the arrest of a fugitive and his delivery to the jailer, though in making the arrest he wounded the fugitive so that he died before he could be delivered to the jailer.—Mosley v. Stone, 108 Ky. 492, 56 S. W. 965.

[i] (La. 1852) Defendant offered a reward for the conviction of any one concerned in setting fire to any building in the state, and through the instrumentality of plaintiff a person was convicted of having subsequently with malice prepared combustible materials and placed them under a building to set fire to it. *Held*, that the reward could not be claimed.—Cornelson v. Sun Ins. Co., 7 La. Ann. 345.

[j] (Mo. 1903) Defendant offered a reward for the arrest and conviction of any person doing a certain act. Plaintiff was a member of the sheriff's posse when he made an arrest, so that he could not claim a reward for this, but he was discharged from the posse, and defendant then renewed the promise, and he then secured the conviction. *Held*, that he was entitled to the reward.—Cornwell v. St. Louis Transit Co., 100 Mo. App. 258, 73 S. W. 305.

[k] (Mo. 1904) S., knowing of a murder, and of a reward for the apprehension, arrest, and conviction of the murderer, and becoming suspicious that J. was guilty, took steps to locate him, and, having done so, telegraphed C., a sheriff, to arrest him, which he did, without knowing of what he was suspected; C. then telegraphing the fact to S., at S.'s expense, receiving a fee for the arrest, and turning J. over to S. who elicited a confession from him, on which he was convicted. *Held*, that S., as against C., was entitled to the reward.—Ralls County v. Stephens, 104 Mo. App. 115, 78 S. W. 291.

[l] (Mo. 1905) Rev. St. 1899, § 2474 [Ann. St. 1906, p. 1485], authorizes the county court to offer a standing reward for the "apprehension and arrest" of any person committing a felony in the county, but prohibits the payment of the reward until the final conviction of the felon. A county court offered a reward for the "apprehension and conviction" of a felon. *Held* that, construing the offer with the statute under which it was made, it constituted an offer to pay a reward after conviction for the apprehension of the felon, and was complied with by a claimant who made such apprehension on his own initiative, and at his own expense and hazard, and put him in the hands of the proper officer, and gave evidence at the trial from which a conviction resulted. —Smith v. Vernon County, 188 Mo. 501, 87 S. W. 949, 70 L. R. A. 59, 107 Am. St. Rep. 324.

[m] (Nev. 1879) Under St. 1877, p. 92, offering a reward for the arrest of each person engaged in the robbery of, or an attempt to rob, any person, etc., the reward to be paid to the person or persons making the arrest immediately on the conviction of the person, there must be an arrest.—Sias v. Hallock, 14 Nev. 332.

[n] (N. C. 1850) One who claims a reward for apprehending a person charged with a criminal offense must prove that the prisoner was lodged in

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jail through force or persuasion moving from himself; for if the prisoner went voluntarily, without force or persuasion, the pretended captor is not entitled to the reward.—Currie v. Swindall, 33 N. C. 361.

[o] (Pa. 1886) To obtain a reward offered for the arrest and conviction of one guilty of a felony, it is necessary that the person claiming the reward should be principally instrumental in the arrest and conviction of the offender, although it is not necessary that he himself should take the witness stand.—Rinehart v. City of Lancaster, 6 Atl. 91.

[p] (Pa. 1892) The fact that sentence is indefinitely suspended after a plea and verdict of guilty in a certain case does not affect the right to a reward offered for "conviction" in such case, as conviction is complete without sentence.—Wilmoth v. Hensel, 151 Pa. 200, 25 Atl. 86, 31 Wkly. Notes Cas. 237, 31 Am. St. Rep. 738.

[q] (Pa. 1894) Under Act March 15, 1821, allowing a reward to one who shall pursue and apprehend a horse thief, one who merely made the complaint, and prosecuted the case, was not entitled to the reward on conviction of the thief.—Commonwealth v. Edwards, 6 Lack. Leg. N. 44, 14 York. Leg. Rec. 22.

[r] (Pa. 1898) Under the act of March 15, 1821, allowing a reward to any person who shall pursue and apprehend a horse thief, the reward is due to one who makes the arrest, though it was done on information furnished by another.—In re Walker, 23 Pa. Co. Ct. R. 305, 9 Pa. Dist. R. 121.

[s] (Tenn. 1857) Where it appears that a party claiming a reward prior to an alleged apprehension of a fugitive had actually aided in the concealment and subsistence of the fugitive, and finally surrendered him to the officers on the express promise with said fugitive that he should be allowed a portion of said sum offered as a reward, there is not an apprehension in a legal sense, and the party is not entitled to the reward.—Bledsoe v. Jackson, 36 Tenn. (4 Sneed) 429.

[t] (Tex. 1860) Merely accompanying a sheriff to another county, where he receives from the custody of the sheriff thereof a prisoner accused of crime, will not entitle a person to a reward offered for the "arrest and delivery" of the accused.—Adair v. Cooper, 25 Tex. 548.

### IV. Information Leading to Arrest or Conviction.

[a] (U. S. 1875) Where a "liberal reward" was offered for information leading to the apprehension of a fugitive from justice, and a specific sum for his apprehension, *held*, that a party giving the information which led to the arrest was entitled to the "liberal reward," but not to the specific sum, unless he in fact apprehended the fugitive, or the arrest was made by his agents.—Shuey v. United States, 92 U. S. 73, 23 L. Ed. 697.

[b] (U. S. 1905) A reward offered "for the arrest of each of the parties convicted" of a stated crime is not earned by merely giving information to an officer which leads to the arrest of a person subsequently convicted.—McClaughrey v. King (C. C.) 135 Fed. 195.

[c] (U. S. 1873) Where a proclamation makes two offers, one for the apprehension of a criminal, the other for information that shall conduce to his arrest, the former offer contemplates his actual capture and delivery to the government. It is not fulfilled by a party giving information which directly leads to the arrest by a foreign government, followed by the criminal's escape before delivery to the American government.—Ste. Marie v. United States, 9 Ct. Cl. 415.

[d] (U. S. 1876) A reward for information which shall lead to a conviction of offenders is earned by services which result in a verdict of guilty, notwithstanding judgment is suspended.—Williams v. United States, 12 Ct. Cl. 192.

[e] (Cal. 1875) An offer, by a party who has been robbed, of a reward for the arrest and conviction of the robbers, is not earned by one who merely communicates to the party robbed his suspicions that a certain person is guilty, with a statement that others were satisfied of his guilt, and that circumstances pointed strongly toward him, and who does not claim the reward until after the arrest and conviction of the robbers.—Burke v. Wells, Fargo & Co., 50 Cal. 218.

[f] (Conn. 1872) A statute provided that, whenever any high crime or misdemeanor should have been committed in any town, the selectmen of the town

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might offer a reward, not exceeding $200, to the person who should make discovery and give information against any other person guilty of such crime or misdemeanor, so that he might be tendered to justice and convicted. A barn was fired by S., who was procured to do it by G. S. was arrested, convicted, and sentenced to the state prison. While in jail, and before trial, and after the reward was offered, he voluntarily disclosed to the attorney for the state the fact of G.'s guilt; but his statements were uncorroborated, and G. was not then prosecuted. Nearly three years afterward, the petitioner, being aware of the disclosure made by S., which was generally known, discovered additional and corroborative testimony, applied to the proper authorities, and caused the prosecution of G., and the steps which he took were the means of his conviction. Without the disclosure made by S., no conviction could have been obtained, nor with that uncorroborated. *Held* that, liberally construed, the petitioner was fairly within the provisions of the statute.—In re Kelly, 39 Conn. 159.

[g] (Ill. 1898) A person who procures the arrest of a party for whom a reward is offered is entitled to the reward, notwithstanding the formal arrest is made by an officer upon his information.—Swanton v. Ost, 74 Ill. App. 281.

[h] (Ill. 1901) Where defendant company offered a reward for the arrest and conviction of certain murderers, and plaintiff identified a man already under arrest as having been seen by him near the place of the murder, and, on the subsequent arrest of another, also identified him in the same manner, and the men arrested were convicted partly on plaintiff's evidence, he was not entitled to the reward, as it could not be apportioned, and plaintiff was in no way responsible for the arrest. Judgment, 94 Ill. App. 385, affirmed.—Williams v. West Chicago St. R. Co., 191 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278.

[i] (Ill. 1901) A person who furnishes information which leads to the conviction of a criminal is not entitled to a reward offered for such "arrest and conviction," where he had nothing to do with the arrest.—Williams v. West Chicago St. R. Co., 94 Ill. App. 385, judgment affirmed 191 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278.

[j] (Ind. 1891) A reward offered for the capture of a thief is not earned by merely giving information to the sheriff which enables him to find and arrest the thief.—Everman v. Hyman, 26 Ind. App. 165, 28 N. E. 1022, 84 Am. St. Rep. 284.

[k] (Me. 1898) Where a reward is offered for the "arrest and conviction" of the person guilty of a certain offense, and plaintiffs thereupon enter upon an investigation of the crime, and discover incriminating evidence against one who, upon being confronted, confesses his guilt, and is subsequently convicted, plaintiffs are entitled to the reward, though the formal arrest was made by a deputy sheriff.—Haskell v. Davidson, 91 Me. 488, 40 Atl. 330.

[l] (Mass. 1856) An offer of a reward "for the apprehension and conviction of any person who shall set fire to any building within the city of Roxbury" entitles a person to the reward who gives information to the police officers of the city on which such an incendiary is arrested, and which has a tendency to produce ultimate conviction, and without which a conviction would not have been had, if the incendiary had not, while under arrest, confessed his guilt, although such person is not called as a witness on the trial, and does not act after the arrest, and the confession is given in evidence on the trial, and perhaps is the ground of the conviction.—Crawshaw v. City of Roxbury, 73 Mass. (7 Gray) 374.

[m] (Mo. 1893) A reward offered for the apprehension and conviction of each of the perpetrators of a crime is not earned by one who merely informs the Governor of the state that one such person is in the penitentiary of another state, and who, without risk, responsibility, or expense to himself appears as a witness at the trial.—Lovejoy v. Atchison, T. & S. F. R. Co., 53 Mo. App. 386.

[n] (N. Y. 1833) Where a reward is offered for the apprehension of a felon, a person communicating information to another without any intention of entitling himself to the reward, or of taking any responsibility in the matter, is not entitled to the reward, though such information proves instrumental in detecting the felon.—City Bank v. Bangs, 2 Edw. Ch. 95.

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[o] (N. Y. 1900) Where the evidence in an action to recover a reward offered for arrest and conviction of a burglar showed plaintiff lived with, and was on intimate terms with, the burglar, saw the stolen articles, and gave information thereof which led to arrest and conviction, and there was evidence that such information was not voluntarily imparted with expectation of reward, but was extorted through fear of arrest for complicity, a judgment for defendant will not be disturbed.—Vitty v. Eley, 51 App. Div. 44, 64 N. Y. Supp. 397.

[p] (N. Y. 1905) A bank in New York City offered a reward for the arrest of its teller, who was a defaulter and a fugitive. The teller appeared at a Boston hotel, where he remained for a few days. A claimant for the reward saw the fugitive at the hotel and notified the bank. This claimant endeavored to keep sight of the fugitive, but before an officer came from New York he disappeared, and the claimant and the officer failed to find him. The fugitive went to another hotel in the city. Plaintiff, the proprietor of the hotel, informed the New York officers of his presence at the hotel. An officer from New York arrived, and the fugitive was arrested and convicted. *Held*, that plaintiff was entitled to the reward as against the claimant.—Atwood v. Armstrong, 102 App. Div. 601, 92 N. Y. Supp. 596.

[q] (Tex. 1896) Where an offer of a reward was made "for information leading to the arrest and conviction" of any person driving off cattle, the person who furnished the "information" leading to the arrest, and not the sheriff who makes it, is entitled to the reward.—Ward v. Keystone Land & Cattle Co. (Civ. App.) 38 S. W. 532.

[r] (Wis. 1869) One giving the police information tending to excite suspicion as to the actual murderer, but giving no evidence of the crime, nor clue to his whereabouts, is not to be entitled to a reward for his subsequent "arrest and conviction."—Austin v. Milwaukee County Sup'rs, 24 Wis. 278.

## V. Delivery.

[a] (Kan. 1878) The sheriff of M. county offered a reward for delivery in M. of a prisoner who had escaped from the jail of F. county, whereupon two persons captured the prisoner, but on demand of the sheriff of F. county surrendered him therein, whence the sheriff of M. took him into M. *Held*, that the captors were entitled to the reward.—Stone v. Dysert, 20 Kan. 123.

[b] (Ky. 1861) One who arrests a runaway slave, under the circumstances specified in Act March 3, 1860 (2 Rev. St. Append.) cannot claim the reward granted by that act, unless he either deliver him to his owner, or to the person from whom he escaped, or to the jail of the county where the owner resides; and where he delivers him to the jailer of the border county, not being the county where the owner resides, he cannot claim the reward on the ground of making this jailer his agent, and that the owner, on calling for his slave, received him from such agent. This would defeat the plain intention of the act.—Nall v. Proctor, 60 Ky. (3 Metc.) 447.

[c] (Ky. 1887) Where a reward is offered for the arrest and delivery of M. to the jailer of Whitley county, the arrest and delivery of M. to the jailer of Bell county did not entitle the person making the arrest to the recovery of the reward offered, although the courts of Bell county alone had jurisdiction of the offense with which M. was charged.—Partin v. Snider, 8 Ky. Law Rep. 616.

[d] (Pa. 1888) Plaintiff is not entitled to the reward offered for the "capture and delivery" of an escaped prisoner, where it appears that he merely informed the sheriff of the prisoner's place of concealment, and was one of the posse that effected the capture.—Juniata County v. McDonald, 122 Pa. 115, 15 Atl. 696.

[e] (S. C. 1858) Where a reward was offered for the apprehension and delivery "to the jail of Kershaw district" of a slave charged with murder, his apprehension and delivery to a magistrate of Kershaw was not such performance of the condition precedent as to entitle to the reward.—Clanton v. Young, 11 Rich. Law, 546.

[f] (S. C. 1860) The Governor offered a reward for the apprehension and delivery to jail of a fugitive slave. A. apprehended him, and delivered him to a constable, who obtained a warrant and committed him to jail. *Held*, that A. was entitled to the reward.—Williams v. Thweatt, 12 Rich. 478.

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VI. ARREST OF PERSON WHO HAS KILLED ANOTHER AND IS FLEEING BEFORE ARREST.

[a] (Miss. 1884) Code 1880, § 3035, provides that "any person who shall arrest any one who has killed another, and is fleeing or attempting to flee, before arrest, and shall deliver him up for trial, shall be entitled to the sum of one hundred dollars." *Held*, that a person who arrested and delivered up one who had been previously arrested, and tried and discharged by a committing magistrate, was not entitled to the reward.—Itawamba County Sup'rs v. Candler, 62 Miss. 193.

[b] (Miss. 1886) A private citizen who arrests a criminal escaped from the custody of a private detective, and delivers him up for trial, is entitled to the allowance under Code, § 3035, providing that "any person who shall arrest another who is fleeing or attempting to flee before arrest and shall deliver him up for trial shall be entitled to $100 out of the treasury of the county in which the homicide occurred."—Wilson v. Wallace, 64 Miss. 13, 8 South. 128.

[c] (Miss. 1893) Under Code 1892, § 1387, allowing a reward for the arrest and delivery of one who has killed another and is fleeing, it is not necessary that the victim should be dead when the arrest of the fugitive is made to entitle the person making the arrest to the reward, but it is sufficient that the victim has received a wound which results in death.—Martin v. Copiah County, 71 Miss. 407, 15 South. 73.

[d] (Miss. 1895) Under Code 1892, § 1387, providing that a person who shall arrest any one who has killed another and is fleeing, or attempting to flee, before arrest, shall be entitled to $100, the reward cannot be claimed for arresting one who, after killing a person, remained at home two days, not concealing himself, and then left for another state, remaining at one place till arrested, it being generally known where he was.—Monroe County v. Bell, 18 South. 121.

[e] (Miss. 1895) Code 1892, § 1387, allows a reward for the arrest of "any one who has killed another, and is fleeing or attempting to flee before arrest," to be paid by the county in which the "homicide occurred." One who wounded another, while his victim was still alive, was arrested, and tried for assault with intent to kill, and discharged. On his victim's subsequently dying, he fled. *Held*, that one arresting him was entitled to the reward.—Newton County v. Doolittle, 72 Miss. 929, 18 South. 451.

[f] (Miss. 1905) Under Rev. Code 1892, § 1387, providing that a person who shall arrest any one who has killed another, and is fleeing or attempting to flee before arrest, and shall "deliver him up for trial," shall be entitled to $100 out of the treasury of the county in which the homicide occurred, one who arrests a fleeing murderer, and merely telegraphs the sheriff of the county in which the homicide occurred of the arrest, is not entitled to the reward, though the sheriff sent out and got the accused, and he was tried and convicted.—Gould v. Chickasaw County, 85 Miss. 123, 37 South. 710.

VII. RETURN OF PROPERTY.

[a] (U. S. 1869) Where a person agrees to pay another a reward, if he recover possession of property which has been unlawfully taken from the promisor, he is not liable to pay the same at the suit of the promisee, where it does not appear that the property passed through the latter's hands, and the same was recovered by police authorities by means of information furnished in part by other persons, and only partly through information received from such promisee.—Franklin v. Heiser, Fed. Cas. No. 5,054 [6 Blatchf. 426].

[b] (Mass. 1864) The owner of property which had been stolen offered a reward "for the detection of the thieves and the recovery of the property." *Held*, that a person who gave information that enabled the owner to make such detection and recovery was entitled to the reward, without doing anything more; the owner not having asked any further service from him when he gave the information and claimed the reward.—Besse v. Dyer, 91 Mass. (9 Allen) 151, 85 Am. Dec. 747.

[c] (Mass. 1867) If a person dealing at a bank accidentally leaves an article on a desk in the banking room, and publishes an advertisement that it was lost, and promises a reward for it, another person, who, while dealing at the bank, discovers and takes it, is not entitled to a reward on returning it

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to the owner, although the desk stood outside of the bank offices, in an open space accessible to all persons entering the room, since by the terms of the advertisement the reward could only be earned by the return of the pocketbook by one who had entitled himself to the rights of a finder of a lost article. —Kincaid v. Eaton, 98 Mass. 139, 93 Am. Dec. 142.

[d] (N. Y. 1873) Where a reward is offered for the recovery, or for information leading to the recovery, of lost propery, the giving of information as to its whereabouts, which information does not in fact lead to its recovery, does not entitle the informer to the reward.—Howland v. Lounds, 51 N. Y. 604, 10 Am. Rep. 654.

[e] (Pa. 1821) A reward was offered for the finding of a package of money and returning it to A. The money had been left in the fireproof chest of A., and was afterwards found on the floor of the same chest by a clerk of A., who delivered it to B. *Held*, the money was not lost, and that the clerk was not entitled to the reward.—Commercial Bank of Cincinnati v. Pleasants, 6 Whart. 375.

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(149 Fed. 159.)

## EAST ST. LOUIS RY. CO. v. LOUISVILLE & N. R. CO.

(Circuit Court of Appeals. Seventh Circuit. October 10, 1906.)

No. 1,317.

1. RAILROADS—USE OF STREETS—INJUNCTION TO PREVENT CROSSING BY STREET RAILROAD.

Under the settled law of Illinois, authority given a railroad company by a city to cross a street with its tracks confers no exclusive rights in such street, but the right granted is subordinate to the use of the street for ordinary street purposes, which include the operating of a street railroad thereon; and the railroad company cannot maintain a suit in equity to enjoin the building and operating of a street railroad upon such street, crossing its tracks at grade, on the ground that such crossing will cause inconvenience to it in the operation of its trains, and add to the dangers of the street crossing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 235, 195, 197.]

2. MUNICIPAL CORPORATIONS—POWER OF CITY COUNCIL TO REGULATE RAILROAD CROSSINGS IN STREETS—ILLINOIS STATUTES.

The plenary powers given to city councils as governmental agencies of the state by City & Village Act Ill. c. 24, § 62 (Hurd's Rev. St. 1905), to regulate the use of the streets of the city, to permit their use by street railroads, and regulate the crossing of streets by railroads, includes power to authorize the crossing of a railroad track over a street by a street railroad; and such power is not taken away or affected by Act July 1, 1889, p. 223, 3 Starr & C. Ann. St. Ill. c. 114, par. 112, p. 3292, creating the State Railroad and Warehouse Commission, with power to prescribe the place where, and the manner in which, one railroad company may cross with its tracks the tracks of another company.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1464, 1465; vol. 41, Railroads, §§ 255, 256.]

Appeal from the Circuit Court of the United States for the Eastern District of Illinois.

The appellee, organized under the laws of Kentucky, and lessee of a railroad corporation organized under the laws of Illinois, had constructed and operated, long before the time of the controversy in question, its railway tracks across Seventh Street, in the City of East St. Louis, at the point in dispute.

The appellant is a corporation organized under the laws of Illinois, authorizing the organization of street railroads, and is operating its street railway in the city of East St. Louis, for the carriage of passengers and their hand bag-

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gage; never having done, and never having been authorized by its charter to do, a general railroad business.

October 24th, 1904, the city council of East St. Louis authorized appellant to construct and operate its street railroad upon Seventh Street, across the tracks of appellee; expressly providing that such crossing be at grade, and specifying the manner of construction and operation, including gates and such other safety precautions as were deemed necessary by the council.

This crossing of its tracks at grade by the street railway, was resisted by the appellee—a petition invoking the jurisdiction of the Railroad and Warehouse Commission of the State of Illinois, to prevent such crossing, being filed October 22nd, 1904; to which petition appellant filed its answer, denying that the Commission had jurisdiction of the subject matter of the crossing. Notwithstanding this challenge of its jurisdiction, the Commission, December 16th, 1904, entered an order that denied the motion to dismiss, and forbade the construction and operation of the street railway as authorized in the ordinance granted by the city council, unless such crossing was effected by an over head bridge.

Certain correspondence ensued between the vice-president of appellant, and the general manager of the appellee—a correspondence that appellee construed as a threat that the appellee would, notwithstanding the order of the Commission complete its crossing at grade—whereupon a bill was filed, upon which, at final hearing, the decree appealed from was entered, restraining appellant from entering upon the right of way and railroad tracks of appellee at the point in dispute, or any point immediately adjacent thereto, except for the sole purpose of constructing and maintaining an over head bridge as prescribed by the Railroad and Warehouse Commission.

The further facts are stated in the opinion.

M. W. Schaefer and W. M. Warnock, for appellant.

J. M. Hamill, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge. The bill set forth, and the decree found, facts tending to show that a crossing at grade, at the point named, owing to the curvature and grade of appellee's tracks, would increase the inconvenience of appellee in the operation of its road, and would add to the dangers to life at such crossing. But these facts, standing alone, do not constitute a ground for the injunction. Atchison, Topeka & Santa Fé Ry. Co. v. General Electric Co. (Circuit Court of Appeals, Seventh Circuit) 112 Fed. 689, 50 C. C. A. 424.

The bill also avers, and the decree finds, that a certain other electric railroad, organized under the street railway act of the State of Illinois, running between the city of East St. Louis and Alton, had an agreement with appellant, by which appellant was under contract to take its cars at the city limits—operating them, from that point, over the tracks of appellant on Seventh Street, to their destination in East St. Louis, for a certain annual rental; and that certain other electric roads, organized under the railroad act of the state of Illinois, had been theretofore permitted by appellant to run their cars over appellant's tracks into the City of East St. Louis; from which it is argued that the crossing in dispute will become, in fact, a crossing between companies doing a general railroad business, and is therefore within the jurisdiction of the Railroad and Warehouse Commission. But if, independently of these facts, the crossing in dispute is not within the jurisdiction of the Commission, we need not pursue the inquiry as to what would be the effect in case such crossing is used by these other roads; for the charter of appellant does not cover such case, and the

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injunction appealed from does not limit itself to any threatened abuse of appellant's charter in that respect. Should such use be attempted, appellee would have its appropriate remedy to prevent injury.

The single inquiry presented to us, therefore, is this: The city council having granted to a street railway company, doing only a street railway business, the right to cross at grade the tracks of a railroad theretofore laid across such street, the crossing to be at a point within the street, has the Railroad and Warehouse Commission of Illinois jurisdiction either to prevent such crossing or prescribe the terms upon which such crossing shall be made?

Section 62, chapter 24, of the City and Village Act of Illinois (passed originally in 1872; Hurd's Rev. St. 1905), provides that the city council shall have power to establish, alter, grade, and otherwise improve streets and alleys; to regulate the use of the same; to permit, regulate, or prohibit the locating and construction of any horse railroad, such permission not to be for longer than twenty years; to provide for and change the location, grade, and crossing of any railroad; and to compel railroads to raise or lower their tracks, to conform to any grade which may be established by the city.

In Robey v. City of Chicago, 215 Ill. 608, 74 N. E. 770 (decided June 23rd, 1905), it was said:

"The City Council, under the General Incorporation Act, which is in force in the City of Chicago, has full power to pass an ordinance granting to a street railway company the right to operate its street railroad in the streets of the city, subject to such limitations as have been imposed upon such municipalities by the Legislature, and in so doing may prescribe the terms and conditions upon which said company may occupy the streets of the city with its tracks, cars, etc. The city, in passing such ordinance, performs a legislative function, and in so doing acts as a governmental agency of the state, and the ordinance, when passed, had the force and effect of a law of the state. In People v. Suburban Railroad Company, 178 Ill. 594, on page 605, 53 N. E. 349, on page 352, 49 L. R. A. 650, it is said: 'The state does not, however, exercise directly that full paramount power which it possesses over streets, alleys,' etc., but in the distribution of governmental powers the General Assembly adopted the policy of selecting the cities and villages of the state as governmental agencies and delegating to such municipalities the power to regulate and control the use of the streets, alleys, etc., within their respective limits. Such power thus delegated is exercised by the municipal authorities acting in behalf of the state for the benefit of the public."

In Atchison, T. & S. F. Ry. Co. v. the General Electric Railway Company, supra, it was said:

"The doctrine is firmly established in the state of Illinois, in accordance with the general weight of authority, that by the construction and use of street railway tracks no additional burden is imposed upon the easement, as such use 'falls within the purposes for which streets are dedicated or acquired,' (2 Dillon Municipal Corporations [4th Ed.] § 722,) but that the use for steam railway purposes is beyond the general public easement and imposes an additional servitude. C., B. & Q. R. R. Co. v. Street Railroad Co., 156 Ill. 255, 267, 273, 40 N. E. 1008, 29 L. R. A. 485, and cases cited; Bond v. Pa. Ry. Co., 171 Ill. 508, 513, 49 N. E. 545; General Electric Railway Co. v. Chicago & W. I. R. R. Co., 184 Ill. 588, 56 N. E. 963. It is equally well settled by the uniform line of decisions in the same state, that the use of a street by a steam railway is legitimate when duly authorized but that no exclusive use is conferred by the permit and it can 'only be enjoyed in common with the use of the avenue by the public as an ordinary highway, and without materially impairing its usefulness as such.' Pittsburg, Ft.

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Wayne v. Chicago R. R. Co. v. Reich, 101 Ill. 157, 173; Ligare v. City of Chicago, 139 Ill. 46, 62, 28 N. E. 934, 32 Am. St. Rep. 179; C. B. & Q. R. R. Co. v. Street R. R. Co., 156 Ill. 255, 265, 267, 273, 40 N. E. 1008, 29 L. R. A. 485; Pennsylvania Co. v. City of Chicago, 181 Ill. 289, 296, 54 N. E. 825, 53 L. R. A. 223; General Electric Railroad Co. v. Chicago & W. I. R. R. Co., 184 Ill. 588, 56 N. E. 963. With the rights of the appellant in this street crossing thus defined they are in subordination to the use for street purposes, which includes use for a street railway; the right is held in common, is 'joint and mutual, not exclusive,' (Reich Case, 101 Ill. 157, 175) and the primary object of the street is for ordinary passage and travel of which the public and individuals cannot rightfully be deprived. Ligare Case, 139 Ill. 46, 52, 28 N. E. 934, 32 Am. St. Rep. 179; General Electric Ry. Case, 184 Ill. 588, 595, 56 N. E. 963."

Other decisions in line with these holdings are: C., B. & Q. R. R. Co. v. Street R. R. Co., 156 Ill. 256, 40 N. E. 1008, 29 L. R. A. 485; Ry. Co. v. Street Railroad Co., 156 Ill. 385, 386, 40 N. E. 1014; Doane v. Lake Street El. R. R. Co., 165 Ill. 517, 46 N. E. 520, 36 L. R. A. 97, 56 Am. St. Rep. 265; Harvey v. Aurora & G. Ry. Co., 174 Ill. 295, 51 N. E. 163; Harvey v. Aurora & G. Ry. Co., 186 Ill. 283, 57 N. E. 857; Gen'l Elec. Ry. Co. v. C. & W. I. R. R. Co., 184 Ill. 588, 56 N. E. 963; Hartshorn v. I. V. Tr. Co., 210 Ill. 609, 71 N. E. 612; Wilder v. Aurora, etc., Tr. Co., 216 Ill. 493, 75 N. E. 194—from which it is plain that unless the power of the city to regulate crossings of railroad tracks by street railways, such crossing being in the streets of the city, is meant by the act of 1889, creating the Railroad and Warehouse Commission, to be subject to the jurisdiction of that commission, when its jurisdiction is invoked, the power of the city, over the subject here in dispute, remains plenary and exclusive.

The act creating the Railroad and Warehouse Commission (Act July 1, 1889, p. 223) is entitled "An Act in relation to the crossing of one railway by another, and to prevent danger to life and property from grade crossings," and reads as follows:

"That hereafter any railroad company desiring to cross with its tracks the main line of another railroad company, shall construct the crossing at such place and in such manner as will not unnecessarily impede or endanger the travel or transportation upon the railway so crossed. If in any case objection be made to the place or mode of crossing proposed by the company desiring the same, either party may apply to the board of railroad and warehouse commissioners, and it shall be their duty to view the ground, and give all parties interested an opportunity to be heard. After full investigation, and with due regard to safety of life and property, said board shall give a decision, prescribing the place where and the manner in which said crossing shall be made, but in all cases the compensation to be paid for property actually required for the crossing and all damages resulting therefrom shall be determined in the manner provided by law in case the parties fail to agree." Starr & C. Ann. St. vol. 3, c. 114, par. 112, p. 3292.

It will be noted, first that the title to the act is "In relation to the crossings of one railway by another." This does not necessarily include, in terms at least, street railways.

It will be noted, also, that the act of 1889 leaves to condemnation proceedings, "in manner prescribed by law in case the parties fail to agree," all question of compensation or damages, growing out of the property actually required for the crossing, or the nature of the crossing prescribed. Now no land is required to be taken for the grade

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crossing of a street railway over a railroad in the streets; and it is doubtful if condemnation proceedings are open to a street railway to ascertain its damage, in case the street railway is compelled to go over head by bridge.

It will be noted, also, that in no case decided in the Supreme Court of Illinois, or in the United States Courts sitting within Illinois, has the plenary and exclusive power of cities and villages over the location of street railway crossings been denied or abated. Indeed, it would come as a surprise, both to the bar and to the people, were it to be held, that in the location of street railways crossing each other, or other railroads, and the manner of such crossing, within the streets, the final power no longer resided in the local authorities, but was removable, under the act of 1889, to the Railroad and Warehouse Commission of the state.

We think that no such interpretation was meant to be given to the act by the Legislature that passed the act. A survey of the occasion that gave birth to the act seems to us to be against such an interpretation. When the act was passed, the local authorities of Illinois had full power, as the governmental hand of the state, to regulate street railway crossings. There was, therefore, unless the wisdom of retaining that power in the municipal authorities was questioned, no occasion to confer it upon some other governmental hand; and it is not shown that the wisdom of continuing such power in the local authorities was even questioned. But to regulate the crossings of railways, outside of streets and highways, there was, until the act of 1889 was passed, no governmental hand. Any railroad already located could, at its own caprice, prevent a projected road from crossings its track, unless the projected road resorted to proceedings in eminent domain; and when such proceedings were resorted to, (the shoe thereupon being shifted to the other foot) the projected road could, at its caprice, cross where, and in the manner, it pleased, provided it was willing to pay such damages as such crossing entailed—a state of the law that left the interests of public life and safety wholly unprovided for.

The act of 1889 was meant to fill this hiatus. It created the Commission—an independent tribunal, that in the case of dispute, would leave it to the interest and caprice of neither railroad to determine where, or what, the crossing should be; but in the interest of the public, would prescribe the place and manner of the crossing. It fulfilled, in this respect, a clearly defined want—fulfilled it, too, in a way that did not interfere with railways responding to each other under the old principles governing eminent domain, or, with local authorities controlling their streets under the old principles of local rule. And this it seems to us must have been its purpose, its sole purpose, in that respect. Indeed to give to the act a wider scope would, we fear, be to substitute judicial legislation for interpretation.

The decree appealed from is reversed with instructions to dismiss the bill for want of equity.

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(149 Fed. 164.)

## RIDER v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 5, 1906.)

No. 2,395.

1. STATUTES—CONSTRUCTION—TITLE.

The title of a legislative act cannot be so read into the body of it as to supply the absence of a substantive provision essential to the conferring of power and authority.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 288.]

2. CRIMINAL LAW—OFFENSES ON HOT SPRINGS RESERVATION—JURISDICTION OF COMMISSIONER.

Act April 20, 1904, 33 Stat. 187 [U. S. Comp. St. Supp. 1905, p. 365] entitled "An act conferring jurisdiction upon United States Commissioners over offenses committed in a portion of the permanent Hot Springs Mountain reservation, Ark.," clearly contemplates the creation of a new office of commissioner clothed with special jurisdiction over offenses committed on the reservation, prescribing the fees, that rules of procedure and practice for "said commissioner" shall be prescribed by the District Court, for appeals to such court, etc., but in the absence of any provision therein for the appointment of such commissioner is ineffective and the jurisdiction so conferred to try offenses cannot be exercised by any United States Commissioner within the district or elsewhere.

3. SAME—JURISDICTION OF DISTRICT COURT—APPEAL FROM JUDGMENT VOID FOR WANT OF JURISDICTION.

A United States District Court although having original jurisdiction of a criminal offense and also jurisdiction on appeal from the judgment of a commissioner cannot render a valid judgment of conviction on an appeal where the commissioner before whom the case was tried below on a complaint filed by a private individual was without jurisdiction of the subject-matter of the offense even though the defendant took the appeal and appeared and submitted to trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2573.]

In Error to the District Court of the United States for the Eastern District of Arkansas.

R. G. Davies (G. W. Murphy, on the brief), for plaintiff in error.
William G. Whipple, U. S. Atty., for defendant in error.

Before VAN DEVANTER and ADAMS, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. Upon a sworn complaint by the United States District Attorney for the Eastern District of Arkansas, made before J. T. O'Hair, United States Commissioner for said district, the plaintiff in error, Dr. Thomas B. Rider, was arrested on the 18th day of May, 1905. This affidavit charged upon information and belief that said Rider, on the 16th day of May, 1905, was a practicing physician at Hot Springs, Ark., in the Western Division of said district; that he was not then and there a registered physician as provided by the act of Congress entitled "An act conferring jurisdiction upon United States Commissioners over offenses committed on a portion of the Hot Springs Mountain reservation, approved April 20, 1904" 33 Stat. 187, c. 1400 [U. S. Comp. St. Supp. 1905, p. 365], and was not then and there authorized to issue a permit to any patient or

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person to take a bath in any of the bathhouses on said reservation; and that said Rider knowingly, willfully, and unlawfully issued a permit to one Mattie Hancock, setting out the permit in hæc verba; that said permit consisted of directions to the said Mattie Hancock for taking a bath at the Superior Bath House; that in pursuance thereof she applied to said bathhouse and attempted to bathe therein; which bathhouse was then and there situated on said reservation.

The warrant issued by said O'Hair commanded the marshal to arrest and bring before him the said Rider. Instead of the marshal taking the prisoner before said O'Hair he took him before Edgar A. Nickels, who styled himself "a United States Commissioner for said district"; by whom he was tried and sentenced, the language of the judgment being:

"From the evidence of the said witnesses, it appearing to me, the commissioner, that the laws of the United States have been violated as charged in the complaint, and that there is a probable cause shown to believe the defendant guilty of the alleged offense, it was ordered that he pay a fine of $25."

From this judgment Rider appealed to the United States District Court for said district, where, on rehearing, he was again found guilty, and sentenced to pay a fine of $100 and costs. To reverse this judgment, Rider prosecuted his writ of error to this court.

At the threshold of every judicial proceeding arises the question of jurisdiction of the tribunal taking cognizance of the cause to proceed to judgment. "The question of jurisdiction is self-asserting in every case. It arises although the litigants are silent. Even their consent cannot authorize cognizance if fundamental grounds of jurisdiction are absent." Yocum v. Parker, 130 Fed. 771, 66 C. C. A. 80. The jurisdiction of said Nickels, before whom Rider was tried, is challenged by him in this court. Authority for his action is predicated by the United States Attorney, on the act of Congress approved April 20, 1904, c. 1400, 33 Stat. 187 [U. S. Comp. St. Supp. 1905, p. 365], entitled "An act conferring jurisdiction upon United States Commissioners over offenses committed in a portion of the permanent Hot Springs Mountain reservation, Ark." The first section of this act designates and defines the Hot Springs Mountain reservation, and limitations. The second section declares that said reservation "shall constitute a part of the Eastern United States Judicial District of Arkansas, and the District and Circuit Courts of the United States in and for said district shall have jurisdiction of all offenses committed within said boundaries." The third section makes provision for the protection of property, etc., within this reservation. The fourth section declares:

"That any person who shall, except in compliance with such rules and regulations as the Secretary of the Interior may deem necessary, and which he is hereby authorized and directed to make, enter or attempt to enter upon said described tract, take, or attempt to take, use or attempt to use, bathe in, or attempt to bathe in water of any spring located thereon, or without presenting satisfactory evidence that he or she (provided he or she is under medical treatment) is the patient of a physician duly registered at the office of the superintendent of the Hot Springs reservation as one qualified, under such rules which the Secretary of the I terior may have made or shall make, to prescribe the waters of the Hot Springs, shall be deemed guilty of a mis-



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demeanor, and, upon conviction thereof, shall be subject to a fine of not more than one hundred dollars, and be adjudged to pay all costs of the proceedings: Provided, That no physician who shall engage in the solicitation of patronage through the medium of drummers, or otherwise, shall be or remain thus registered: And provided further, that if any person so bathing, or attempting to bathe, or so entering, or attempting to enter upon the described tract, shall have the permit of a physician, such physician shall be liable to the penalties of this section, unless he be regularly registered; and such person shall not be liable to the penalties of this section, unless it shall be made to appear that he knew, or had reason to believe, that the physician giving him such permit was not regularly registered."

The fifth section (33 Stat. 188 [U. S. Comp. St. Supp. p. 367]) applies to the punishment of offenses under municipal ordinances of the city of Hot Springs and the laws of the state of Arkansas. Section 6 of the act, which presents the principal controversy in this case, is as follows:

"That such commissioner shall have power, upon sworn complaint, to issue process in the name of the United States for the arrest of any person charged with the doing, otherwise than in compliance with the rules and regulations of the Secretary of the Interior, of any act with reference to the matters which the Secretary of the Interior in section four of this act is authorized to regulate, or in violation of such rules and regulations, or in violation of any provision of this act, or with any misdemeanor or other like offense the punishment provided for which does not exceed a fine of one hundred dollars to try the person thus charged, and if found guilty, to impose the penalty prescribed. In all cases of conviction an appeal shall lie from the judgment of said commissioner to the United States District Court for the Eastern District of Arkansas. The said United States District Court shall prescribe rules of procedure and practice for said commissioner in the trial of cases and with reference to said appeals."

As this section does not designate or create "such commissioner," naturally enough the word "such" would refer to some preceding section of the act defining the commissioner and prescribing the manner of his creation and the extent of his authority. There is not a reference to him or his office in any creative provision of the statute. It is conceded in the brief of counsel for the government that unless this casus omissus in the active power of the provisions of the act can be aided and eked out by reference to its title, there is nothing to designate who "such commissioner" is or how he derives his authority. Conceding that the American doctrine is that the title may constitute a part of the legislative act, and that preambles may be referred to to discover the mind of the Legislature, where the statute is obscure or ambiguous, it is as correct law to-day as when uttered by Mr. Justice Field, in Hadden v. Collector, 5 Wall. (U. S.) 107, 18 L. Ed. 518, that the title "is still considered as only a formal part; it cannot be used to extend or to restrain any positive provisions contained in the body of the act. It is only when the meaning of these is doubtful that resort may be had to the title, and even then it has little weight. It is seldom the subject of special consideration by the Legislature."

There is no authority to support the broad proposition that the title may be so read into the body of the act as to supply the absence of a substantive declaration essential to the creation of power and authority. Most certainly the title of this act cannot be resorted to for the purpose of showing that "such commissioner" is any United States

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Commissioner, regardless of where located, when the whole trend of the enactment plainly indicates that it was the mind and purpose of Congress that this special jurisdiction was to be exercised by a special commissioner, who, from the inception to the close of the proceeding, was to exercise functions and powers quite apart from those conferred upon the well-known class of United States Commissioners. As the subject-matter is purely local, confined to the small territory reservation, and to a new and singular character of offenses, in the absence of express language to that effect in the enacting provisions it is incredible that Congress contemplated that this extraordinary and responsible jurisdiction might be exercised by any United States Commissioner in the District of Arkansas or elsewhere. A careful analysis of the whole act contradicts such contention.

In the latter part of said section 6 it is declared that:

"The said United States District Court shall prescribe rules of procedure and practice for said commissioner in the trial of cases and with reference to said appeals."

Evidently the framer of the statute did not have in mind the existing United States Commissioners in said district. If he had, what was the occasion or necessity for the District Court prescribing rules of procedure and practice for "said commissioner" in the trial of cases? The existing statutes, as well as the decisions of the courts, already defined the procedure and practice for the well known United States Commissioners. But as evidence that it was the purpose to create a new office, clothed with a special jurisdiction hitherto unknown to the law, it was provided that the District Court should first prescribe for him rules of procedure and practice in the conduct of trials. It is not shown affirmatively in this case that the District Court had ever formulated or prescribed any such rules for the government and direction of "such commissioner." On the contrary, it is the contention of the government that the functions of such commissioner were to be performed by a United States Commissioner, and, therefore, it would not be necessary that the court should prescribe any rules of procedure and practice for him. The seventh section (33 Stat. 188 [U. S. Comp. St. Supp. 1905, p. 368]) confers power on "said commissioner" to issue process for the arrest of any person charged with the commission of any criminal offense within said boundaries not covered by the provisions of section 6 of the act. It confers on him authority to bind over the defendant for trial to the District Court; provides how the offender may be bailed, and where committed in default of bail—provisions which would have been quite unnecessary in respect of United States Commissioners, whose duties in this respect are well defined by existing law and well-known practice. The eighth section, having in view the creation of a new office, with hitherto undefined powers and modes of procedure, directs that all process issued by the commissioner shall be directed to the marshal of the United States for the Eastern District of Arkansas. The ninth section directs:

"That the commissioner referred to in this act and the marshal of the United States and his deputies in the eastern district of Arkansas shall be paid the same fees and compensation as are now provided by law for like services in said district."

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Why make such provision if it were contemplated that the existing United States Commissioners should exercise the jurisdiction, when the general statute specifically fixes the fees for like services in the district? Section 10 directs that all fees, costs, and expenses arising in cases under this act, and properly chargeable to the United States shall be certified, approved, and paid as are like fees, costs, and expenses in the courts of the United States. Why direct especially how such fees, etc., shall be certified, approved and paid, when immemorially the general statutes have provided how the fees, costs and expenses of United States Commissioners shall be certified and paid?

The United States Attorney invokes the aid of the act of August 18, 1894, c. 301, 28 Stat. 416 [U. S. Comp. St. 1901, p. 717], which directs that United States marshals upon the arrest of a person under criminal charge shall take him before the nearest United States Commissioner for hearing, as tending to show that any commissioner nearest the place of arrest was intended as "such commissioner." This very contention demonstrates that Congress had in mind a special, local commissioner, to be created for this especial office. Under said act of August 18, 1894, an offender if arrested in the most remote state or territory and taken before the nearest United States Commissioner would be entitled to a speedy hearing before such commissioner. Can it for one moment be entertained that the Hot Springs act contemplates that Dr. Rider, if arrested in the territory of Alaska, could be taken before a United States Commissioner there, and by him, not bound over for his appearance before the United States District Court for the Eastern District of Arkansas where the offense was committed for final trial, but tried, convicted, and fined by the United States Commissioner for Alaska, outside of the vicinage where the offense was committed? The act of August 18, 1894, has to do alone with matters of fees—the lessening of costs in mere preliminary hearings before United States Commissioners. The act contemplates the issuing of a warrant of arrest by one commissioner and the hearing by another; while it is manifest by section 6 of the Hot Springs act that it contemplates the issuance of a warrant, the trial, and imposition of the fine shall be by one and the same commissioner. It is apparent on the face of the Hot Springs act that the framer attempted to model it after that of the Yellowstone Park act, approved May 7, 1894. 28 Stat. 73, c. 72 [U. S. Comp. St. 1901, p. 1562]. The confusion or oversight arose when it came to making the distinction between the character of trespasses and offenses peculiar to the Yellowstone Park and those of the Hot Springs reservation. After constructing section 4 of the Hot Springs act, corresponding with the same section in the Yellowstone Park act, as to offenses, in order to extend the jurisdiction to a different character of offenses than those respecting bathing, the framer of the Hot Springs act divided the matter into two sections—four and five. So while section 6 of the Yellowstone Park act designated the commissioner who was to exercise the primary jurisdiction, and directed the manner of his appointment, and then proceeded to say: "Such commissioner shall have power, upon sworn information, to issue process in the name of the United States for the

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arrest of any person charged with the commission," etc.; the framer of the Hot Springs act, when he came to the corresponding provision, began with the clause that "Such commissioner shall have power, upon sworn information," etc. It is not the province of the courts by judicial construction to supply flagrant omissions of essential positive provisions in a statute. The remedy, as well as the responsibility for an abortive act, must rest with the legislative branch of government.

It is suggested by the United States Attorney that the conviction in this case may be sustained upon the theory that as section 2 of the act confers jurisdiction upon the United States District Court for the Eastern District of Arkansas of all offenses committed within the boundaries of said reservation, it was sufficient that such jurisdiction was exercised on appeal from the judgment of the commissioner Nickels. There is some authority for the proposition that where a court has both appellate and original jurisdiction over the subject-matter, and the case reaches such court on appeal from a tribunal which did not have jurisdiction over the subject-matter, if the parties appear in the appellate court and submit to trial, the judgment thereon is valid. Randolph County v. Ralls, 18 Ill. 29. But this proposition is controverted even in civil cases. In Osgood v. Thurston, 23 Pick. (Mass.) 110, a scire facias was issued from the court of common pleas on a judgment rendered in the Supreme Judicial Court. On appeal from the judgment thereon from the court of common pleas to the Supreme Judicial Court, Shaw, C. J., held that the common pleas court did not have jurisdiction over the subject-matter; and notwithstanding the defendant below appeared to the action in the Appellate Court by interposing a general demurrer, it was held that the court only took cognizance by appeal, and, therefore, it was without jurisdiction. Thereupon the plaintiff moved that as the cause was before the court invested with original jurisdiction for leave to amend the original writ so as to make it appear as a writ issued out of the Supreme Court. To this the Chief Justice said:

"But with all the latitude of indulgence with which amendments are allowed, the court are of opinion that this is impossible. It is to be recollected, that the papers now before us, are copies of the writ and judgment of the court of common pleas, as they there appear of record. An alteration of the copy of that writ, would not only falsify the exemplification of the record as it is certified by the clerk of that court, but would make it a bad writ as a writ of the court of common pleas. If, after amendment, it were deemed an original writ issuing from this court, then it has never been served or returned, and the court could not proceed upon it."

In Dillard et al. v. St. Louis, K. C. & N. R. Co., 58 Mo. 69, jurisdiction was assumed by a justice of the peace over a subject-matter for the recovery of damages to an extent beyond his jurisdiction. The action might have been originally instituted in the Circuit Court On appeal to the latter court, it was held that although no motion was made to dismiss the action for want of jurisdiction in the justice court, the judgment was reversed, and the cause dismissed, "as the want of jurisdiction in the court over the cause of action cannot be waived, but may be insisted on at any stage of the proceedings." Citing Webb v. Tweedie, 30 Mo. 488. Without deciding that this prosecution could

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be instituted in the first instance in the District Court, it is sufficient to say that we are unable to find any precedent or authority in a criminal proceeding for treating a cause on appeal, where the prosecution might have been originally instituted in the Appellate Court, as if it had been so instituted, the defendant appearing and going to trial. On principle this contention cannot be sustained. It is indispensably essential to confer jurisdiction upon the United States District Court to proceed in a criminal cause, that either a true bill of indictment, found by a grand jury, or information in due form by the United States Attorney, should first be presented to the court. There is no such practice recognized in criminal procedure as a voluntary appearance by the accused and the making up of an issue on an agreed statement of facts, as might be done in a civil action. A judgment of sentence without indictment or information would be both a novelty and a nullity.

This proceeding was instituted under section 6 of the Hot Springs act "upon sworn complaint," which might have been made by any person. Such complaint is adapted alone to a proceeding before "such commissioner." The mere transcript of this proceeding was brought into the District Court by appeal. An original proceeding in the District Court could not be instituted on a mere sworn complaint. It would require an information in due form, lodged by the United States District Attorney, on leave first had from the court, showing probable cause, and not based on mere information and belief. United States v. Baugh (C. C.) 1 Fed. 788; United States v. Tureaud (C. C.) 20 Fed. 621; United States v. Polite et al. (D. C.) 35 Fed. 58; United States v. Smith (C. C.) 40 Fed. 755. The plaintiff in error was not brought before the District Court on such an information, and was not tried on plea thereto; but the District Court acquired jurisdiction only by virtue of the appeal from the judgment of conviction and sentence by an officer who had no jurisdiction. The case before the commissioner, as before the District Court, stood as on a plea of not guilty, under which every defense, whether to the jurisdiction or to the merits, was open to the accused. Had he never appealed from that judgment, as it was coram non judice, the sentence could not lawfully have been enforced. As this case does not depend solely upon any construction and application of the federal Constitution, but turns upon the proper construction of an act of Congress and the authority of the United States Commissioner to try and sentence the person thereunder, the writ of error was properly prosecuted to this court. Spreckels Sugar Refining Company v. McClain, 192 U. S. 407, 24 Sup. Ct. 376, 48 L. Ed. 496; Harris v. Rosenberger, 145 Fed. 449, 76 C. C. A. 225.

It results that the judgment of the District Court is reversed, and the cause is remanded, with directions to the District Court to vacate its judgment, and to discharge the defendant for lack of jurisdiction.

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(149 Fed. 171.)

# THE JUMNA. THE McCALDIN BROTHERS. THE JAMES S. T. STRANAHAN. THE GYPSUM KING. THE W. FREELAND DALZELL. THE J. B. KING CO. NO. 19. THE GYPSUM EMPEROR.

(Circuit Court of Appeals, Second Circuit. November 14, 1906.)

Nos. 37-39.

1. COLLISION—INEVITABLE ACCIDENT.

In the admiralty law the phrase "inevitable accident" has a comprehensive meaning, and it is not necessary that the accident should be the result of a vis major. If no negligence can be imputed to either vessel in a collision, there is a presumption that they were navigating in a lawful manner and the accident may be said to be inevitable; the test being whether the collision could have been prevented by the exercise of ordinary care, caution, and maritime skill.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 19.]

2. SAME—INSCRUTABLE CAUSE.

Where the evidence is so conflicting that it is impossible to determine to what direct or specific acts a collision is attributable, it is a case of damage arising from a cause that is inscrutable, and under the settled modern rule in this country there can be no recovery or partial recovery therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 20.]

3. SAME—EVIDENCE CONSIDERED.

Evidence *held* to sustain the finding of a court of admiralty that it did not establish negligence or fault on the part of any of the vessels concerned in a series of collisions in East river, following the parting of a tug's hawser, and to exonerate all from liability on the ground that the collisions were due to inevitable accident or to an inscrutable cause.

Appeal from the District Court of the United States for the Southern District of New York.

On appeal and cross-appeal from a decree of the District Court for the Southern District of New York dismissing the libel and cross-libels and deciding that the collision between barge No. 19, in tow of the tug Gypsum King, and the steamship Jumna, and the subsequent collision of said barge and the schooner Gypsum Emperor with the New Haven Railroad's pier No. 38, East river, was the result of inevitable accident.

The opinion of Judge Holt in the District Court is reported in 140 Fed. 743.

Charles C. Burlingham, for J. B. King Transp. Co.
La Roy S. Gove, for McCaldin Bros. Co.
Wilhelmus Mynderse, for the Dalzell.
J. Parker Kirlin, for the Jumna.
Joseph H. Choate, Jr., for New York, N. H. & H. R. Co.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. It is conceded on all hands that, except in a few unimportant details, the facts are fully and accurately stated in the opinion of the district judge. He has carefully considered the conflicting theories of fault and has reached the conclusion that negligence has not been established as to any of the vessels participating in the collision. To arrive at this result it was necessary for him to determine several disputed questions of fact regarding which it is suf-

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ficient to say that in many instances he was unquestionably right and in no instance is the finding so clearly against the preponderance of proof as to warrant us in setting it aside.

For instance, was the Jumna's hawser sufficient and in proper condition? Was the tow of the Gypsum King properly made up? Did the McCaldin Brothers make proper effort to reach the port side of the Jumna? Did the Dalzell put a sudden strain on the hawser?

In each of these instances the district judge found against the asserted negligence and we think the weight of testimony sustains these findings. Like him we are unable to localize the blame for the collision. We had some doubt as to whether the tugs in charge of the Jumna, and particularly the McCaldin Brothers, can be exculpated but, after an examination of the testimony, we incline to the opinion that they did everything which could be reasonably expected of them and that the McCaldin Brothers started to make fast to the port quarter of the Jumna as soon as the latter cleared the pier and it was possible to get around her stern.

The judge of the District Court has found that the collision was the result of an inevitable accident. Such an accident usually happens when it is not possible to prevent it by the exercise of due care, caution and nautical skill. It is generally, though not invariably, attributed to an act of God, as where a tremendous tempest arises, such as devastated Galveston a few years ago, or more recently destroyed the shipping in the harbor of Havana. So, where a dense fog or falling snow obstructs the vision, where a gale and high seas unite to make navigation difficult, or where a severe storm is prevailing upon a dark night, a collision happening in such circumstances, the colliding vessels exercising the care, skill and caution required by prudent navigation, would be attributed to inevitable accident. Such accidents usually occur when safe navigation is rendered impossible from causes which no human foresight can prevent; when the forces of nature burst forth in unforeseen and uncontrollable fury so that man is helpless, and the stoutest ship and the most experienced mariner are at the mercy of the winds and waves.

In admiralty law, however, the phrase has a more comprehensive meaning. It is not necessary that the accident should be the result of a vis major. If no negligence can be imputed to either vessel there is a presumption that they are navigating in a lawful manner and where no fault can be shown the accident may be said to be inevitable.

In the case of The Morning Light, 2 Wall. 550, 17 L. Ed. 862, Mr. Justice Clifford, quoting Dr. Lushington, says (page 561 of 2 Wall. [17 L. Ed. 862]):

"Inevitable accident must be considered as a relative term, and must be construed not absolutely but reasonably with regard to the circumstances of each particular case. Viewed in that light, inevitable accident may be regarded as an occurrence which the party charged with the collision could not possibly prevent by the exercise of ordinary care, caution, and maritime skill."

In the case of The Grace Girdler, 7 Wall. 196, 19 L. Ed. 113, the Supreme Court say:

"Inevitable accident is where a vessel is pursuing a lawful avocation in a lawful manner, using the proper precautions against danger, and an accident

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**occurs. The highest degree of caution that can be used is not required. It is enough that it is reasonable under the circumstances."**

The test is, could the collision have been prevented by the exercise of ordinary care, caution and maritime skill? In the case at bar we are unable upon the testimony before us to specify any particular fault, to put our finger upon any act or omission and assert that to it the accident was attributable. Fault may exist, but we are unable to discover it; it is inscrutable. Where the evidence is so conflicting that it is impossible to determine to what direct and specific acts the collision is attributable, it is a case of damage arising from a cause that is inscrutable. The Fern and The Swann, Newb. 158, Fed. Cas. No. 9,588. Whether the case at bar be thus classified, or whether it be held to come within the admiralty definition of inevitable accident is not material; in either event the loss must be borne by the party on whom it falls.

In the early administration of the maritime law in this country the damages were divided in cases of inscrutable fault precisely as in cases where both vessels were in fault. The John Henry, 3 Ware, 264, Fed. Cas. No. 7,350; The Sciota, 2 Ware (Dar. 359) 360, Fed. Cas. No. 12,508; The Fern and The Swann, supra. The question has now been definitely decided by a vast preponderance of authority that there can be no recovery or partial recovery unless fault be affirmatively shown. The Clara, 102 U. S. 200, 26 L. Ed. 145; The Breeze, 6 Ben. 14, Fed. Cas. No. 1,829; The Grace Girdler, supra; The Sunnyside, 91 U. S. 208, 215–216, 23 L. Ed. 302.

As we all concur in the conclusion that the case at bar falls within one of these categories, the decree should be affirmed with costs.

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**(149 Fed. 178.)**

## BROCK v. UNITED STATES.

**(Circuit Court of Appeals, Third Circuit. November 6, 1906.)**

**No. 29.**

**BANKS AND BANKING—NATIONAL BANKS—PROSECUTION OF OFFICER FOR MISAPPLICATION OF FUNDS.**

**Evidence that the cashier of a national bank overdrew his account, by means of checks which were not charged to his account, but carried in the drawer as cash and afterwards taken up by his note, all without the knowledge or consent of the board, is sufficient to warrant his conviction by a jury of misapplication of the bank's funds, in violation of Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497].**

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

George S. Graham, for plaintiff in error.

Henry P. Brown, for the United States.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. This is a writ of error sued out by George P. Brock to the District Court for the Eastern District of Pennsylvania. Brock, who had been cashier of the Doylestown Na-

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tional Bank, was indicted in that court under Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], for willful misapplication of the moneys, funds, and credits of that institution. The jury found him guilty of this offense, and on entry of judgment and sentence he sued out this writ. The assigned errors now insisted upon are the court's refusal to admit a certain account in evidence and to give binding instructions for a verdict for defendant.

Apart from all other cases of alleged overdraft, we are of opinion the proofs bearing on five certain checks to which we now refer made the duty of the court clear to submit the case to the jury. On August 20, 1902, the defendant drew a check for $2,000 against his account in the Doylestown National Bank, of which he was then cashier, to the order of the First National Bank of Philadelphia (where he kept a personal account). This check was paid by the Doylestown Bank August 22, 1902, but was not charged to Brock's account. Had it been, it would have made an overdraft of $1,370.56. On September 2, 1902, he drew another check against his account to the order of the Consolidated Lake Superior Trustees (of some of whose stock he was an underwriter) for $4,000, and one to C. E. Wolbert, Treas. (who was treasurer of a silk company in which defendant was interested), for $6,400, which checks were paid by the bank September 4, 1902, but were not charged to his account. Had they, as well as the preceding check, been charged, they would have made an overdraft of $7,011.37. On September 15, 1902, he drew another check against his account to the order of C. E. Wolbert, Treas., for $1,250, which was paid by the bank September 17, 1902, but was not charged to his account. Had it, as well as the preceding checks, been charged, they would have made an overdraft of $8,351.25. On December 13, 1902, he drew a check for $2,000 against his account to the order of Ross, Morgan & Co. (a brokerage firm with which he had an account), which was paid by the bank December 16, 1902. It was not charged to his account. Had it, as well as the preceding checks, been so charged, they would have made defendant's overdraft $15,415.43.

On the part of defendant it was contended these checks were mere temporary advances made by him for bank customers who ordered securities bought; that as soon as the securities came the customers paid for them, and the money thus paid took up the checks, which had meanwhile been carried in the drawer as cash. When cross-examined, the defendant did not give the name of such customers or the amount paid by them, or specify any particular transactions. On the part of the government there was testimony tending to show that defendant was largely indebted to the bank on other loans, and that these check overdrafts were not known to or sanctioned by the board. Its contention was that these checks were not paid by customers as above stated, but were carried for several months in the drawer as cash, and that finally, on February 3, 1903, they were taken up by the defendant, giving his own note for them to the bank, without the knowledge or consent of the board. The defendant contended the note thus given was not for these checks, but was for an actual discount, the proceeds of which he received, but how he did not show, and that such note was discounted, and afterwards renewed, with the knowledge and consent of the board.

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In corroboration of the government's contention, it was shown that the aggregate of these five overdraft checks, viz., $15,650, less a check for $4,650, dated January 31, 1903, given by Brock to the bank, made (making allowance for $90 discount) the exact amount of the note, viz., $11,090. It was also shown that on the stub of defendant's check book, opposite his check of $4,650, so given as above, the defendant had entered, "On ac. checks in drawer, Silk Lk. Sup. and 1st Ph. $4,650," which entries were alleged to refer to the overdraft checks above noted. Now, it is apparent that if the jury found these checks were not temporary advances for customers, but were overdrafts by the defendant himself and made without sanction, that they were carried as cash in the drawer and were finally taken up by the discount of an unauthorized note, they were warranted in finding that in making these overdrafts defendant had willfully misapplied the funds of the bank of which he was cashier. This the jury has done, and we are clear it was the duty of the court below, under the proofs, to deny the request of the defendant for a peremptory entry of a verdict of not guilty.

Further, we find no error in the action of the court in excluding the account of Ross, Morgan & Co. From the colloquy that followed its offer, it appears defendant desired its introduction for the twofold purpose of showing his account with that firm was not a speculative one and that he was a man of means, the owner of the collateral stocks which the account embraced. It will be noted that the objection made was to the account, standing alone, but not if properly proven. This we may fairly infer from the statement of the district attorney:

"If my friend wanted to make use of it [the account], let him call the witness, and ask questions, and identify it in the proper and regular way, so that we should have an opportunity to cross-examine."

There was no offer to do this, and the court then held the account was not competent, and added:

"I want it distinctly understood that I am ruling on the account itself, considered as an instrument of evidence offered now as a piece of paper."

There was no error in this ruling. There was no offer to further prove it, to show that defendant was the owner of the securities which it embraced, or even that they still remained in the broker's hands. But, apart from this, the court in its charge forcibly and clearly placed before the jury as uncontroverted facts all that defendant now contends they might have inferred from this account. In other words, while it excluded the account as not sufficiently proven, it gave the defendant the benefit of all and more than all that was offered to be proved by it. In charging, the court said:

"It is quite clear from the testimony that the defendant was not engaged in speculative purchases of stock during this period. There is no evidence that he was buying or selling any stocks at that time. He had an account with the brokers, Ross, Morgan & Co., which he was protecting. I do not clearly understand what the nature of that account was, but, as near as I can make out, he owed this firm some money; upon what account does not appear, as I recall the testimony; that he had put up with them a certain amount of collateral for the protection of that loan, and from time to time, on two or three occasions—I do not remember exactly how many, but two or three occasions—these securi-

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ties that were up as collateral depreciated, some of them at least, and he was called upon to put up some money in order to protect the loan. There were no speculative purchases or sales of stocks during this period. That is quite clear."

After careful consideration, we find no error, and the judgment of the District Court must be affirmed.

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(149 Fed. 176.)

## In re JACOB BERRY & CO.

(Circuit Court of Appeals, Second Circuit. October 11, 1906.)

No. 274.

BANKRUPTCY—RECOVERY OF PLEDGE—TRANSACTIONS BETWEEN STOCKBROKER AND CUSTOMER.

A deposit of securities with a stockbroker by a customer as margin, and as security against losses in stock transactions, under an agreement which does not contemplate a sale or disposition of such securities by the broker except in the event of losses, constitutes a pledge, and does not create the relation of debtor and creditor, and where the securities have not been sold by the broker to meet marginal requirements prior to his bankruptcy, they may be recovered by the pledgor from the bankrupt's trustee.

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of New York.

See 147 Fed. 208, 77 C. C. A. 434; 146 Fed. 623.

J. M. Rosenberg, for petitioners.

R. L. Sweezey, Graham Sumner, and A. W. Putnam, for respondents.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

WALLACE, Circuit Judge. This is a petition by the trustees in bankruptcy of Jacob Berry & Co. to review an order of the bankruptcy court, awarding to various claimants of the bankrupts certain securities, or the proceeds thereof, in the possession of the trustees. Jacob Berry & Co. were stockbrokers, and the claimants were severally customers of the firm.

Upon the general question whether the relation between customer and stockbroker under the ordinary contract for a speculative purchase of stock is that of pledgor or pledgee, we are in accord with the decision of the court below, and have recently decided that such a relation does exist in Richardson, Trustee, v. Shaw et al., 77 C. C. A. 643, 147 Fed. 659.

The claimants of the pledged stock in this case are not seeking to follow into the hands of the trustees in bankruptcy the proceeds of stock purchased for them by the brokers; but are seeking the proceeds of stocks which they had deposited with the brokers upon opening an account, or in the course of dealings, for speculative purposes. The contract between them and the brokers is found in the receipt delivered to each one of them by the brokers at the time of deposit, and is illustrated by the receipt of Mrs. Taggart, which reads as follows:

"Sep. 14, 1904.

"Received from Anna D. Taggart 83 shs U. S. Steel pfd No. A30563–C15546. The same to be a general deposit, and this receipt is given and received with

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the mutual understanding that Jacob Berry & Co. may hold the same as margin and as security for or apply the deposit in part payment of or on account of losses or any other transactions in the purchase or sale of stocks, bonds, securities, or commodities made by them for your account.

"This receipt is given and received upon the further understanding and agreement in consideration of Jacob Berry & Co. executing such orders for the purchase or sale of stocks, bonds, securities or commodities as may be given to them in writing, orally, by telegraph or telephone; that the said Jacob Berry & Co. may repledge, rehypothecate or loan any or all of said stocks, bonds, securities or commodities held by them on account thereof as margin or otherwise; may substitute similar stock, bonds, securities or commodities therefor, and that said Jacob Berry & Co. may, without notice upon the approximate exhaustion of margin sell, or buy as the case may be, any stocks, bonds, securities or commodities bought and sold or held by them as collateral, or margin, or otherwise, and that in case of contracts for future delivery that said Jacob Berry & Co. may close the same by purchase or sale, as the case may be, without notice, provided however, that such purchases or sales may be made upon the consolidated Stock and Petroleum Exchange of New York, the New York Stock Exchange, the Chicago Board of Trade, or in any other Exchange in the city of New York where such stocks, bonds, securities, or commodities are dealt in.

"No. A30563–33 Shs.

"No. C15546–50 Shs.

"Geo. M. Davis, Mgr."

The question upon which the rights of the parties really depends is whether the relation of pledgor and pledgee is created between client and stockbroker by a deposit of this character, or whether such a deposit is not in effect a release of the client's title to the security to the broker which creates the relation of creditor and debtor. If the deposit is to be regarded as a deposit of money, the broker is impliedly authorized to sell the stock and credit the proceeds to the client in account. If it is deposited merely as security, the relation of pledgor and pledgee certainly continues until losses arise which justify a sale of the stock. In the present case the brokers did not sell the securities deposited by the several claimants to meet marginal requirements on account of losses, but hypothecated them in a lump to obtain a loan to themselves.

It will be observed that the contract contains two distinct provisions: One relating to the deposited stock, and the other relating to the stocks, securities, etc., which the brokers are to purchase or sell for the client. It is the latter alone that the brokers "may repledge, rehypothecate, or loan," when held by them as margin or otherwise. As to the deposited stock, they "may hold the same as margin and as security" for losses on any transaction, or may apply it in part payment of or on account of such losses. If money had been deposited instead of the securities, it would ordinarily have been credited on account to the clients and stood as a margin against losses; and as to any balance in the brokers' hands at any time the clients would have been merely creditors. If the securities had been deposited under a stipulation in the contract that they should stand as a margin for a specific sum, perhaps the same legal consequences would have attended the transaction. But there is nothing in terms, nor as we think by implication, which suggests that the parties contemplated any sale of the deposited stock to the brokers, or any sale or disposition of it by the brokers except in the event of

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losses of the client, approximately exhausting the marginal requirement.

The order under review is affirmed, with costs to the claimants severally.

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(149 Fed. 178.)

## In re GARRISON.

(Circuit Court of Appeals, Second Circuit. December 4, 1906.)

No. 53.

1. BANKRUPTCY—DISCHARGE—DESTRUCTION OF BOOKS—BURDEN OF PROOF.

Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 684] provides that a bankrupt shall be discharged unless he has, with intent to conceal his financial condition, destroyed, concealed or failed to keep books of account or records from which such condition might be ascertained. *Held*, that, where a creditor seeks to prevent a discharge on such ground, the burden is on him, not only to show that the bankrupt failed to keep books of account, but that his omission was with intent to conceal his financial condition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 720.]

2. SAME—EVIDENCE.

Where a bankrupt residing in New York was a member of a firm doing business in Port Huron, Michigan, the failure of such firm to keep proper books of account, and the bankrupt's failure, for a period of a year, during which the firm did business, to see that proper books were kept, did not preclude him from obtaining a discharge for failure to keep proper books, as provided by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 684].

Appeal from the District Court of the United States for the Southern District of New York.

On appeal from an order of the District Court for the Southern District of New York confirming the report of a referee in bankruptcy, sitting as special master, which recommended that the bankrupt's discharge be denied for the reason that the creditor who opposed his discharge had established the truth of the second specification filed by him, which is as follows: "Second, that (the bankrupt) as a partner and a member of the firm of T. W. Brown & Co., of Port Huron, Michigan, with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy failed to keep any books of account, records or papers from which his true financial condition or interest in said business might be ascertained." The petition in bankruptcy was filed and the petitioner was adjudged a bankrupt August 12, 1904. The order appealed from confirming the second specification, and refusing a discharge was entered December 1, 1905.

J. E. Melick, for appellant.
W. L. McCorkle, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, C. J. (after stating the facts). The section of the bankruptcy act under which the specification was filed is, as amended by the act of 1903, as follows:

"The judge shall hear the application for a discharge, and such proof and pleas as may be made in opposition thereto by parties in interest, * * * and discharge the applicant unless he has * * * with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of ac-

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count or records from which such condition might be ascertained." Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 684].

It will be observed that in order to establish the second specification it was necessary, under the amended law, to prove two propositions: First, that the bankrupt had failed to keep books of account, and, second, that his omission to do so was with intent to conceal his financial condition. Upon both of these propositions the burden was upon the opposing creditor to prove his allegations by convincing proof. In re Corn (D. C.) 106 Fed. 143; In re Gaylord (D. C.) Id. 833; In re McGurn (D. C.) 102 Fed. 743.

The finding against the bankrupt is based principally upon his answer that it was impossible to get at a correct statement of the condition of T. W. Brown & Co., for the reason that the books kept by Brown and his bookkeeper at Durand and Port Huron, Michigan, are so "unintelligent" that they do not give the necessary information regarding the status of the firm.

The brief of the opposing creditor contains many accusations of fraud and misconduct on the part of the bankrupt which cannot be considered here, for the reason that they were presented by twelve specifications, other than the second, which were all found in favor of the bankrupt, no appeal having been taken by the creditor.

We are now concerned with the single proposition, should the bankrupt, who resided and transacted business in the city of New York, be refused a discharge because the books of the firm of T. W. Brown & Co., of which the bankrupt was a partner, were improperly kept at Durand and Port Huron, Michigan, by Brown and his bookkeeper? The firm of T. W. Brown & Co. was formed in 1902 and continued about a year, the partners being Brown, Jean, and the bankrupt, who was to have one-third of the profits if the business succeeded; in fact it was conducted at a loss. The firm was transacting a small business in buying butter, eggs and poultry in Michigan and shipping them to Jean, Garrison & Co., in New York. When the firm was dissolved its liabilities were about $2,700, part of which was paid. The books were kept by Brown and by his bookkeeper at Port Huron. Three or four of the books were sent to the bankrupt and the ledger was produced in court. He never saw it until it was shipped to New York and had nothing to do with it or any of the books of Brown & Co. When asked why it was that he did not have some knowledge of the manner in which the books were kept the bankrupt answered:

"Simply because this concern was operating in Michigan a thousand miles away, and I trusted to the honesty of T. W. Brown to handle the books and the affairs of the company out there right and make us money out of it."

Granting that his conduct in not keeping a closer watch upon the business at Port Huron was careless and even reprehensible, we fail to see how it can be said that he failed to keep proper books showing the condition of a firm whose business was conducted by one of the partners in a distant state and whose books were never under his control during the short life of the partnership. It would seem a sufficient answer to the charge against him to show that he never saw the

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books, did not keep them or direct their keeping and, having confidence in his partner, supposed that the business was being properly conducted.

But there is still greater difficulty in establishing the second ingredient of the charge, viz., the intent to conceal the bankrupt's financial condition. Conceding, for the moment, that he knew of the inadequate and improper bookkeeping at Port Huron it is not easy to perceive how the bankrupt's interests were in any manner subserved by such bookkeeping. The bankrupt would hardly connive at a system, or lack of system, which threw his affairs into inextricable confusion and concealed the true state of affairs not from his creditors but from himself. If any one were to be benefited by imperfect books it would be Brown and not the bankrupt.

Furthermore, the character of the business, the bankrupt's small interest, if, indeed, he had any individual interest therein, the short duration of the partnership, the difficulty of personal supervision of its affairs, the improbability that the bankrupt, residing in New York, would attempt to conceal the details of the comparatively insignificant branch of the business transacted in Michigan and the seeming lack of motive for the fraudulent conduct attributed to him, lead us to the conclusion that the charge against him has not been sustained.

The order is reversed, with costs, and the cause is remanded to the District Court with instructions to grant the discharge.

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(149 Fed. 180.)

## INTERNATIONAL & G. N. R. CO. et al. v. HOYLE.

(Circuit Court of Appeals, Fifth Circuit. November 29, 1906.)

No. 1,575.

REMOVAL OF CAUSES—WANT OF JURISDICTION OF FEDERAL COURT—DUTY TO REMAND.

The removal by one of two joint defendants of a cause which was not removable because of the absence of a separable controversy does not give the federal court jurisdiction, and the cause should be remanded at any stage, at the instance of any party or on the court's own motion, whenever such fact appears.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, §§ 218, 219.]

In Error to the Circuit Court of the United States for the Western District of Texas.

J. D. Guinn and Waller S. Baker, for plaintiffs in error.

Allan D. Sanford, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The defendant in error, S. C. Hoyle, a resident citizen of San Antonio, Bexar county, Tex., filed this suit in the district court of Robertson county, Tex., against the plaintiffs in error, the International & Great Northern Railroad Company and the Pullman Palace Car Company, to recover $5,000 on account of alleged

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personal injuries inflicted upon his wife, Mabel A. Hoyle, on or about the 19th day of October, 1903, resulting from the alleged negligence of the plaintiffs in error in failing to stop their train at the regular stopping place in Hearne, Tex., and causing her to disembark and walk to the depot at Hearne, an alleged distance of about half a mile. The plaintiff in error the International & Great Northern Railroad Company answered in the district court of Robertson county by general exception, general denial, contributory negligence upon the part of Mabel A. Hoyle; and answered, further, that it was not guilty of negligence, and that, if any one was, the employés of the Pullman Company were, and prayed for a recovery over against the Pullman Company if judgment should be rendered against it. The plaintiff in error the Pullman Company answered by general exception and general denial, and thereafter, by petition and bond duly filed, removed this cause to the Circuit Court of the United States for the Western District of Texas, at Waco, Tex. Both plaintiffs in error repleaded in the Circuit Court, but there was no material change in the answer of the International & Great Northern Railroad Company. Judgment was rendered in favor of the defendant in error against both plaintiffs in error on the 18th day of November, A. D. 1905, for $2,300, interest and costs.

Plaintiffs in error filed separate motions for a new trial. The motion for new trial as filed by the plaintiff in error the International & Great Northern Railroad Company raises succinctly the sole question raised by this plaintiff in error—that is, that the petition filed in the state court by S. C. Hoyle, the defendant in error, against the plaintiffs in error, did not present distinct and separate causes of action, one of which was against the railroad company and the other against the Pullman Company, but embraced a single cause of action and a single ground of relief—and it is urged in this motion for a new trial that the judgment be vacated and the cause be dismissed or remanded to the state court for the want of jurisdiction in the honorable Circuit Court. The court overruled the motion of plaintiff in error the International & Great Northern Railroad Company, and it duly excepted in open court, and tendered its bill of exception to the court, which was signed and sealed by the court. The judge signing the bill said in explanation:

"When the cause was called for trial, the court remarked to counsel that the cause was not removable, and suggested that a motion to remand be made. Counsel for plaintiff retired to consult and determined that they would not make the motion. Counsel for railroad company was also present and failed to make a motion to remand. The cause went to trial and judgment, and after judgment the railroad company submitted a motion to remand to the state court, which, under the circumstances, the court overruled."

The suit as originally brought in the state court presented only one cause of action, and there was no separable controversy of which either defendant could avail itself for purposes of removal. See Wilson v. Oswego Township, 151 U. S. 56, 14 Sup. Ct. 259, 38 L. Ed. 70; Brown v. Trousdale, 138 U. S. 396, 11 Sup. Ct. 308, 34 L. Ed. 987; Torrence v. Shedd, 144 U. S. 530, 12 Sup. Ct. 726, 36 L. Ed. 528; Pow-



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ers v. Chesapeake & Ohio Ry. Co., 169 U. S. 97, 18 Sup. Ct. 264, 42 L. Ed. 673. It follows that the suit was not removable to the United States Circuit Court and that court acquired no jurisdiction.

The want of jurisdiction of the court below can be assigned as error by any plaintiff in error, although he provoked the removal in question. See Capron v. Van Noorden, 2 Cranch, 126, 2 L. Ed. 229; The Dred Scott Case, 19 How. 393–440, 15 L. Ed. 691; Railway Co. v. Swan, 111 U. S. 379–383, 4 Sup. Ct. 510, 28 L. Ed. 462. And this court will on its own motion notice the absence of jurisdiction in the court below. Jackson v. Ashton, 8 Pet. 146, 8 L. Ed. 898; Chapman v. Barney, 129 U. S. 681, 9 Sup. Ct. 426, 32 L. Ed. 800; Mattingly v. N. W. Virginia Railroad, 158 U. S. 57, 15 Sup. Ct. 725, 39 L. Ed. 894, and cases there cited.

The judgment of the Circuit Court is reversed, and the cause is remanded, with instructions to set aside the verdict and remand the cause to the state court from which it was removed, the costs of this court to be paid by the Pullman Palace Car Company.

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(149 Fed. 182.)

## PRESSED STEEL CAR CO. v. STEEL CAR FORGE CO.

(Circuit Court of Appeals. Third Circuit. December 31, 1906.)

No. 38.

1. TRIAL—VERDICT—FORM.
   A verdict that "we the jury in the above case sustain the validity of the contract sued upon, and fix the damages at ten dollars," was fatally defective and insufficient to sustain a judgment.
2. SAME—AMENDMENT.
   Such verdict was incapable of amendment after the separation of the jury.
3. JUDGMENT—ENTRY NUNC PRO TUNC—POWER OF CLERK.
   Where the clerk neglected to enter judgment pursuant to the direction of the court during the term, he had no power thereafter to enter judgment nunc pro tunc.
4. SAME—ENTRY—OMISSION—COURT RULES.
   Circuit Court rule 16, providing that, where judgment shall be omitted to be entered on a verdict, it shall be considered as entered on the last day of the term, is applicable only to a verdict which is sufficient to support a judgment.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Charles Gibbs Carter and James H. Beal, for plaintiff in error.

George B. Gordon, for defendant in error.

Before DALLAS, Circuit Judge, and BRADFORD and LANNING, District Judges.

BRADFORD, District Judge. It appears from the transcript of record that the Steel Car Forge Company, the defendant in error, brought an action of assumpsit in the circuit court of the United States for the Western district of Pennsylvania against the Pressed Steel Car Company, the plaintiff in error, to recover damages for alleged

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breach of contract. There was a jury trial, resulting in the following finding, June 15, 1905:

"We the jury in the above case sustain the validity of the contract sued upon and fix the damages at ten dollars."

A motion for a new trial was made by the defendant, June 20, 1905, and was denied as appears from the following record entry:

"And now, to wit, June 30th, 1905, no reasons having been filed in support of the motion for a new trial, the motion is overruled and the clerk is directed to enter judgment. Per Curiam."

Notwithstanding the direction of the court below, the transcript of record does not disclose that any judgment was entered in the case, and during the hearing in this court the attention of counsel was called to that fact. Since that time both parties through their counsel of record have presented a petition to this court setting forth in substance, among other things, that the clerk of the court below did not enter judgment as he had been directed to do; that judgment customarily is entered in the western district of Pennsylvania after the denial of a motion for a new trial by adding the words "and judgment on the verdict"; that the neglect of the clerk to "enter judgment on the verdict was not known to either of the parties in this case until attention was called thereto by this court during the argument of the case"; that according to the rules and practice of the court below the "verdict in this case has the same force and effect as though judgment had been entered as of the last day of the term"; that the clerk of the court below, when his attention was called to the omission to enter judgment, made a minute upon the court docket as set forth in his certificate attached to the petition; and that it was within the power of the court below "to enter judgment nunc pro tunc, even after the expiration of the term". The certificate of the clerk, entitled in the case, under the seal of the court and dated December 5, 1906, is to the effect that the following is a true and correct copy from the record, namely:

"And now, December 5th, 1906, judgment is hereby entered upon the verdict nunc pro tunc as of November 11th, 1905, being the last day of the term in which the verdict was rendered, in accordance with the opinion of the Court filed on the 30th day of June, 1905, and Rule 16 of this Court, and the stipulation of counsel for plaintiff and defendant duly filed."

Rule 16 of the court below is stated in the petition to be as follows:

"Motions for new trials and in arrest of judgment and to take off a nonsuit must be made within four days after the verdict or entry of nonsuit, and motions for new trials must be made notwithstanding points have been reserved within the time limited above. In all these cases, the reasons reduced to writing, shall be filed of record. Where judgment shall be omitted to be entered upon a verdict it shall be considered as entered upon the last day of the term."

The prayer of the petition is as follows:

"Your petitioners therefore pray this Honorable Court to make an order amending the record in this Court in accordance with the minute made in the court below, as is set forth in the certificate of the clerk attached hereto, and that your Honors will direct a writ of certiorari to bring up the record of the judgment in the court below, or, if necessary, issue a special remit-

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**titur sending the record down to the court below for amendment, and then a special certiorari bringing it back to this Court, or that this Court should take such other action as may to this Court seem the proper practice, and that your Honorable Court should then proceed to determine and dispose of this case."**

The prayer of the petition clearly must be denied. The finding that "we the jury in the above case sustain the validity of the contract sued upon and fix the damages at ten dollars" was fatally defective and after the separation of the jury incapable of amendment. It was an anomaly in an action at law. It could not by any possibility warrant the entry of judgment upon it; for it was a mere nullity. Nor does the petition show that any judgment was entered upon it. It admits that the clerk neglected to enter judgment pursuant to the direction of the court given June 30, 1905. In undertaking "of his own motion" to enter judgment nunc pro tunc December 5, 1906, on the finding of the jury, the clerk transcended his authority, and what purports to be a judgment is without effect and absolutely void. The claim that by virtue of rule 16 "the verdict in this case has the same force and effect as though judgment had been entered as of the last day of the term" does not help the petitioners. Certainly if judgment had been entered on the last day of the term on the "verdict" it would have had nothing to support it. But, further, rule 16 is either self-executing or not. If it be not self-executing admittedly no judgment was entered or to be considered as entered during the term when the jury made its finding. If, on the other hand, the rule be self-executing it can have application only to verdicts capable of supporting judgments. This conclusion necessarily results from the provision that "where judgment shall be omitted to be entered upon a verdict, it shall be considered as entered upon the last day of the term." There is thus no ground on which it would be proper to grant the prayer of the petition; and, as no judgment is disclosed, this court is without authority on this writ of error to consider the merits. The dismissal of the writ of error may not, in view of the fact that in legal contemplation there is neither judgment nor verdict in the court below, necessarily prevent the doing of justice between the parties through a new trial. Of course, we are not to be understood as expressing a definite opinion on this point, as it is properly cognizable by the court below. For the reasons given this writ of error must be dismissed with costs, and it is so ordered.

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(149 Fed. 184.)

## STANDARD PLUNGER ELEVATOR CO. v. BRUMLEY et al.

(Circuit Court of Appeals, Third Circuit. December 5, 1906.)

No. 33.

1. PRINCIPAL AND AGENT—COMPENSATION—ACTIONS—VALUE OF SERVICES—EVIDENCE.

**Where, in an action for services under an alleged express contract to pay 10 per cent. of the price of certain sales of machinery made by plaintiff, defendant denied the contract as alleged, and averred that the agreement provided for a much smaller compensation, evidence as to the rea-**

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sonable value of plaintiff's services was admissible as bearing on the question as to which agreement was made.

2. SAME—PAYMENT—TIME.

Where, in an action for agents' commissions on sales of machinery, the oral contract sued on did not provide as to the time when the amounts claimed should be payable, evidence as to the time usually fixed for the payment of similar commissions was admissible.

3. SAME—QUESTION FOR JURY.

Where, in an action for agents' services in the sale of certain machinery, plaintiffs claimed for additional services rendered to defendants in the performance of certain contracts outside their general oral contract of agency, whether such extra services were incident to such contract or whether they were independent thereof was for the jury.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

See 144 Fed. 713.

William Metcalf, Jr., for plaintiff in error.

Joseph A. Langfitt, for defendants in error.

Before DALLAS and GRAY, Circuit Judges, and LANNING, District Judge.

GRAY, Circuit Judge. The original suit in this case was brought in the court of common pleas for Allegheny county, in the state of Pennsylvania, and removed upon petition of the defendant, on the ground of diverse citizenship, to the Circuit Court of the United States for the Western district of Pennsylvania.

The cause of action was the alleged violation of a certain oral contract, the terms of which, as set out in plaintiffs' statement of claim, may be summarized as follows:

Plaintiffs were engaged in the business of constructing and repairing elevators, and acting as agents for the sale of elevator machinery. The defendant was also engaged in the manufacture and sale of elevators, and in February, 1903, entered into a contract with the plaintiffs, by which the plaintiffs undertook to sell elevator machinery produced by the defendant, and were to receive for such agency and sales a ten per cent. commission on the amount of any contracts secured by said plaintiffs for said defendant. The plaintiffs aver that, in pursuance of said contract, four specific sales of defendant's machinery were made by them to four different purchasers, aggregating in amount $133,450, and that thereby the defendant became indebted to the plaintiffs for their commission of ten per cent., as aforesaid, or $13,345. The plaintiffs aver further that the defendant arranged with them to use their place of business as headquarters in the city of Pittsburgh, and induced and employed the plaintiffs to assist defendant in carrying out its contracts, including contracts other than those pertaining to the sales made by plaintiffs, and that said contract for the use of office, and for assistance in carrying on defendant's general business, was duly performed by said plaintiffs during the period of one and a half years; and that said services "were fully worth the sum of $2,000 per annum, or $3,000 for said period." This latter sum, added to the commissions claimed, less certain credits, aggregated $13,960.30, which, with interest from January 1st, 1904, is the amount sought to be recovered in the suit.

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Defendant, in its affidavit of defense, denies that there was any contract to pay plaintiffs a ten per cent. commission on all sales secured by them, but avers that the agreement as to compensation for plaintiffs' services was, that the same should be arranged between the parties as to each particular contract which plaintiffs might obtain, until a written contract could be agreed upon between plaintiffs and defendant; that defendant proposed a written contract to plaintiffs, but they refused to accept or execute the same, and no written contract was ever entered into between the parties. Defendant denies that the work or business of the agency was diligently prosecuted by plaintiffs, and especially denies that a certain one of the sales, specified by plaintiffs in their statement of claim, was ever made by said plaintiffs, but was in fact made by the defendant itself, and that as to the other three sales for which commission is claimed by the plaintiffs, specific agreements were made by which a much smaller aggregate amount was to be paid to plaintiffs, a part of which had been paid, and the balance, by the terms of said contracts, had not, at the time of the bringing of suit, become due.

On the issues thus made under the pleadings, the case was tried and submitted to the jury, and a verdict rendered for about one half of the amount claimed. Bills of exception were allowed and signed by the trial judge, as to the admission of certain evidence, and three of the six assignments of error are directed to such admissions. The first and third assignments of error relate to the admission of the testimony of witnesses, alleging themselves familiar with the elevator business, to the effect that the customary compensation for the sale of elevator machinery by an agent, was ten per cent. The objection made to this testimony is that, the suit being one on an express contract, evidence as to the quantum meruit was irrelevant, it being assumed that no count to that effect was contained in the statement of claim. This objection would be good, if the special agreement as to the compensation for, or value of, the services rendered, were not controverted by the defendant. But in this case it is controverted, and a different special agreement is alleged, providing for a much smaller compensation than that claimed under the contract as set up by the plaintiff. In such cases, it is proper for either party to prove the value of such services, as bearing upon the issue between them, and the probability that the one or the other agreement was made. Barney v. Fuller, 133 N. Y. 605, 30 N. E. 1007; Allison v. Horning, 22 Ohio State, 138. Upon this ground, the testimony objected to was admitted by the trial judge. We incline to think, too, that the statement of claim contains what, under the informal pleading sanctioned by the Pennsylvania practice, may be considered a quantum meruit count, under which, of course, the testimony would be admissible.

The second assignment covers an objection made to the admission of testimony, as to the time usually fixed for the payment of commissions in the matter of contracts made by agents. As the oral contract set out in the statement of claim covers no agreement as to the time when the commissions claimed should be payable, evidence on this point was clearly admissible, and was a matter of fact to be dealt with

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by the jury upon the evidence, and not a question of law to be determined by the court.

The fourth assignment of error objects to that part of the charge of the court submitting to the jury the question as to the propriety of the charge of $3,000 for the use of plaintiffs' office in Pittsburgh, and compensation for services outside of their agency, rendered during the period stated. We think the court, with perfect fairness, submitted it to the jury, to determine whether these services were incident to the general employment, as agent, or were so independent thereof as to entitle the plaintiffs to claim, under a quantum meruit, separate compensation therefor. It is to be remembered that the contract here declared on is not in writing, and so to be construed by the court, but is an oral contract, to be established out of the mouths of witnesses, and its existence, scope and extent are facts to be determined by the jury. So the question, whether the so-called outside services of plaintiffs were incident to their general contract of agency, or were rendered independently thereof, was primarily a question for the jury, and a careful reading of the evidence, as disclosed in the record, does not convince us that the jury would not be justified in finding this point in favor of the plaintiffs. It is to be noted, too, that the record discloses no request to the court for binding instructions to the jury, and consequently no exception or assignment of error in that respect.

The fifth and sixth assignments of error are without merit, and require no discussion.

The charge of the court, on the whole, was entirely fair to the defendant, and we find no error in the matters referred to in the specifications.

The judgment below is therefore affirmed.

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(149 Fed. 187.)

## BOYD v. ARNOLD, LOUCHEIM & CO. et al. *

(Circuit Court of Appeals, Fifth Circuit. December 15, 1906.)

No. 1,594.

**BANKRUPTCY—APPEAL—REFEREE'S FINDINGS—REVIEW.**

Where an application for a bankrupt's discharge was heard on briefs and the report of a referee overruling the specifications of objection, and the referee's findings, so far as they were disputed, were amply supported by the testimony, an order denying the application will be reversed on appeal.

[Ed. Note.—Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

Appeal from the District Court of the United States for the Western District of Texas.

D. A. Kelley, for appellant.

J. D. Williamson, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. The appellant was adjudged bankrupt on his voluntary petition. In due time he made his application

* Rehearing denied January 15, 1907.

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for a discharge. Pursuant to a general order of the bankruptcy court authorizing the clerk to set down applications for discharge for hearing before the referee, this application was set to be so heard. Notices were sent out to all known creditors, and in due time certain of them filed objections to the granting of the discharge, specifying several grounds, originally presented and afterwards amended, which sufficiently appear, without specification at this place, in the extracts hereinafter given from the referee's report. Issues thus presented were strenuously litigated before, and examined fully by, the referee; the respective parties being represented by able counsel. The evidence, both documentary and oral, in full compass and minuteness, was taken and brought up in the transcript now before us. We do not deem it necessary to review it in detail. It is accurately summarized in the report of the referee, and thereupon he made his findings as follows:

"From the foregoing facts, I find that it is true, as stated in specification of objection No. 1, that J. W. Boyd, the bankrupt, has an interest in 1,579 acres of land in the name of his wife, A. F. Boyd, in Coryell county, Tex., but that the affidavit to the schedules in which this is not set out as a part of his property was not made willfully and fraudulently, nor with the intention of concealing such interest from his creditors. It is true, as stated in specification of objection No. 2, that the said J. W. Boyd has an interest in 1,579 acres of land in the name of his wife, A. F. Boyd, but that the same was not transferred to his wife, nor procured to be transferred to his wife, for the purpose of defrauding, hindering, or delaying his creditors. I find that it is true, as charged in specification of objection No. 3, that the said James W. Boyd has an interest in the said 1,579 acres of land in the name of his wife, A. F. Boyd, but that it is not true that said property was willfully and fraudulently concealed from his trustee in bankruptcy after his adjudication herein. I further find that it is true, as stated in specification of objection in the amended specification filed herein, that the said James W. Boyd took $85 from the cash drawer of the Boyd Mercantile Company, a bankrupt, and had same charged to his personal account, but that such taking was not done for the purpose of appropriating the property to his own use, or for the purpose of defeating the bankruptcy act, and was not taken from the property, nor was it a concealment of the property in this proceeding, which is No. 496, James Watson Boyd, Bankrupt; that it otherwise appears that said bankrupt has fully complied with the requirements of the acts of Congress relating to bankruptcy, and the orders of court touching his said bankruptcy; and that it appears that all notices, wherever required, have been given in the manner, for the length of time, and in the terms required by the bankruptcy acts and rules of court. Wherefore I recommend that the prayer of said petitioner be granted."

This report was filed in the bankruptcy court the 17th day of May, 1906, and on the 30th day of that month the district judge entered the following order:

"The petition for discharge filed by James Watson Boyd, bankrupt, in the above-entitled cause, coming on to be heard, and the same, together with the specifications of objection thereto filed by creditors, the certificate of the referee, the evidence in the cause, and the briefs of counsel, having been carefully examined and duly considered, the court is of the opinion that a discharge should not be granted. It is therefore ordered and adjudged that the prayer of the petition for discharge be, and the same is, hereby denied."

It clearly appears, from the recitations contained in the foregoing order, that the matter was submitted to the court on briefs of counsel. We have carefully examined and duly considered all the matters.

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shown in the record which appear to have been before the trial judge, and have reached a different conclusion from that expressed in his order. The referee specifies the four grounds of objection that were made by the creditors to the application for discharge, and distinctly finds that the mistake, if any, that was made in the verified schedules, was not made willfully and fraudulently, nor with the intention of concealing any interests from his creditors; that the 1,579 acres of land was not transferred to his wife, nor procured to be transferred to her, for the purpose of defrauding, hindering, or delaying his creditors; that the indefinite interest which the bankrupt (in the opinion of the referee) had in the 1,579 acres of land was not willfully and fraudulently concealed from his trustee; that the $85 referred to in the fourth objection, which the bankrupt drew from the Boyd Mercantile Company, another bankrupt, and had same charged to his personal account, was not done by him for the purpose of defeating the bankruptcy act; that the bankrupt has fully complied with the requirements of Congress and the orders of court touching his bankruptcy; and that all notices, wherever required, have been given in the manner and length of time required by the bankruptcy act and the rules of court. These findings of the referee, so far as they are disputed by the appellees, are, in our opinion, amply supported by the testimony.

It is therefore ordered that the decree of the District Court be reversed, and the decree now rendered here that the prayer of the petition for discharge be, and the same is, hereby granted.

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(149 Fed. 189.)

## CHAPMAN DECORATIVE CO. v. SECURITY MUT. LIFE INS. CO.

(Circuit Court of Appeals, Third Circuit. November 20, 1906.)

No. 17.

1. DAMAGES—BUILDING CONTRACT—STIPULATION FOR LIQUIDATED DAMAGES FOR DELAY.

A provision of a building contract, reciting that in case of delay in the completion of the building the damages to the owner will be difficult of computation, and that it is therefore agreed that in case of delay beyond the time fixed the contractor shall pay a stated sum per day from that time until completion as liquidated damages, where it is shown that in fact the damages actually sustained by the owner could not be accurately computed, is conclusive upon the parties in the absence of fraud or mutual mistake.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 164.]

2. CONTRACTS—CONSTRUCTION—DAMAGES FOR DELAY.

Where a building contract which contained a stipulation for the payment of liquidated damages by the contractor in case of delay in the completion of the work also provided that if such delay should be caused by the default of the owner, architect, or other contractors, the time of such delay should be allowed him, but that no such allowance should be made unless a claim therefor should be made to the owner or architect within 24 hours, the latter clause is enforceable and binding on the contractor.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 145 Fed. 434.

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Reynolds D. Brown, for plaintiff in error.
Joseph H. Taulane, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. This is a writ of error to the Circuit Court for the Eastern District of Pennsylvania. In that court the Chapman Decorative Company brought suit against the Security Mutual Life Insurance Company to recover on a contract for decorative work done for the latter in its office building. The plaintiff assigns for error certain rulings of the court by reason whereof the verdict rendered by the jury in its favor was for a less amount than it is alleged should have been returned. There was no dispute as to the amount of work done or the price therefor, but the instructions complained of were:

First, that defendant was entitled to an allowance of $50 per day for stipulated damages agreed to in the contract as follows:

"It is mutually agreed and understood that in the event of said interior finish herein contracted for not being entirely finished on or before the 15th day of March, 1905, that the actual damages sustained by the owner will be difficult of computation, therefore it has been agreed and hereby is agreed by and between the parties hereto that in the event of the failure of said contractor to have all of said interior finish of main entrance and eighth floor completed on or before the 15th day of March, 1905, there shall be due and payable, and said contractor shall pay to the said owner the just and full sum of $50.00 per day for each and every day after March 15th, 1905, that the same or any part thereof, remains unfinished and incomplete, and that said sum is hereby agreed upon as liquidated damages."

And, secondly, that plaintiff, having failed to make any request to the architect for allowance for delay, was precluded from defending on that ground by virtue of the contract provision following, viz.:

"That should the contractor be obstructed or delayed in the prosecution or completion of his work by the act, neglect, default or delay of the owner or architect, or of any other contractor, employed by the owner, or Robinson Company upon the work, or by any damage which may happen by fire, lightning, earthquake or cyclone, or by strikes or lockouts, through no default of the contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid, but no such allowance shall be claimed or made unless a claim therefor shall be presented in writing to the owner, or Andrew J. Robinson Company, within twenty-four hours after the occurrence of such delay. The duration of such extension shall be certified to by the architect, but appeal from his decision may be made by arbitration as provided in article III of this contract."

Manifestly, there was no error in the court so ruling. In the Sun, etc., Association v. Moore, 183 U. S. 643, 22 Sup. Ct. 240, 46 L. Ed. 366, it was held:

"Parties may, in a case where the damages are of an uncertain nature, estimate and agree upon the measure of damages which may be sustained from the breach of an agreement. The naming of a stipulated sum to be paid upon the nonperformance of a contract, is conclusive upon the parties in the absence of fraud or mutual mistake."

In Stephens v. Essex, etc., 75 C. C. A. 60, 143 Fed. 845, this court applied that principle. We think the facts in the present case likewise

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call for its application. The defendant, an insurance company, was erecting a large office building. It arranged to vacate its then present quarters, and itself occupy three stories of the new building on April 1st following the contract. These stories, as well as the main entrance and lobby, plaintiff was to decorate and complete in every detail by March 15th. The other seven stories were to be rented to tenants. The renting term in that vicinity began April 1st. This building was one of the only two large office buildings in that locality, both of which were to be finished at the same time, and were in competition for tenants. In point of fact, the plaintiff did not finish the work until midsummer, and, prior to such completion, defendant was unable to charge rent to the tenants it did obtain under the conditions existing when this contract was made, and, in view of the difficulty of ascertaining all and the impossibility of ascertaining some of the loss sustained by the defendant by reason of delay, the case was a proper one in which to fix such damages in advance by stipulation. Moreover, in view of the large amount of rentals involved, we think the price of $50 per day agreed upon was reasonable. Such being the case, we are of opinion the court was justified in instructing the jury that the amount thus agreed upon by the parties was not a penalty, but stipulated damages.

So, also, in enforcing the provision in regard to delays, the court committed no error. During the progress of the work, the defendant made no claim to the architect, either in writing or otherwise, for allowance for delay in accordance with the provision quoted, and in the answer to the defendant's tenth point, the court instructed the jury that no claim for obstruction or delay could be allowed. No reason is now shown why this clause of the contract should not be enforced. The parties made such an agreement, and thereby made it a law for themselves. Its purpose evidently was to avoid just such a contest as the plaintiff here seeks to raise. In the absence of a claim for extension for delay, the defendant had a right to presume, either that no valid ground to ask an allowance existed; or, if it existed, it was not serious enough to call for an extension. These provisions in building contracts have been enforced in courts. Feeney v. Bardsley, 66 N. J. Law, 240, 49 Atl. 443; Curry v. Olmstead (R. I.) 59 Atl. 392; Davis v. La Crosse Hospital Ass'n (Wis.) 99 N. W. 351; and, as we have said, no reason is shown why it should not be enforced here.

The judgment of the court below is affirmed.

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(149 Fed. 191.)

## BALTIMORE & O. S. W. R. CO. v. DAVIS.

(Circuit Court of Appeals, Seventh Circuit. October 25, 1906.)

No. 1,316.

1. COURTS—JURISDICTION OF FEDERAL COURTS—ALLEGATIONS AND PROOF OF CITIZENSHIP.

The testimony of a plaintiff that he was at "home" in a certain town and that he lived there is sufficient proof of his citizenship in the state in which such town is situated to sustain the jurisdiction of a federal

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court in a suit against a corporation of another state, although the averment of citizenship in his declaration is defective.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 885.]

2. MASTER AND SERVANT—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Plaintiff was a brakeman in the service of defendant railroad company, and while engaged in coupling a car on a side track to a train, at night, took hold of the coupling lever of such standing car with one hand while he reached with the other between such car and the approaching car to open the knuckle as was necessary. He then discovered that the chain connecting the pin to the lever was broken so that the pin must be raised by hand which necessitated the use of both hands between the cars. Before he could raise the pin and open the knuckle in that way the cars came together and one hand was crushed. Plaintiff had no previous knowledge of the defect which was due to the negligence of defendant's inspector. *Held*, that the question whether or not plaintiff was chargeable with contributory negligence was one for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1125.]

## In Error to the Circuit Court of the United States for the Eastern District of Illinois.

The plaintiff in error was the defendant below in suit of Thomas R. Davis to recover for personal injuries, and this writ is prosecuted from a judgment in favor of the latter. The parties are hereinafter referred to as plaintiff and defendant respectively, in such suit below. Jurisdiction is challenged for want of declaration or proof of diversity of citizenship. All other assignments of error rest upon the plaintiff's version of facts, refusal of the court thereupon to direct a verdict in favor of the defendant and instructions which were given; but each question for review is free from complication.

The plaintiff was a brakeman, in the service of the defendant railway company, and was injured while coupling freight cars, in making up a train in the railroad yards at Flora, Ill., where the defendant inspected and repaired its cars. The work was under his direction, to signal the engineer for moving the cars, with the cars standing on a "coach track," extending north and south, in four partings or "cuts," before daylight in the morning—the train having been made up the previous day, with opportunity for inspection and repair. The plaintiff had taken the car numbers, in readiness for coupling, and the engine was at the south end of the south "cut," which embraced five or six cars, with the north one a refrigerator car; this was equipped with automatic couplers, having a lift lever which extended out on the east side of the car. An ordinary freight car similarly equipped, was next north of it, and they were not coupled, as the plaintiff discovered on attempting to couple the air hose; so upon his signals the engine pulled up the first cut a few feet and then backed to make the coupling. When the return movement commenced, the plaintiff stepped in between the cars to open the knuckle of the coupler on the refrigerator car, which was liable to be closed by movement of the car and does not open automatically. These couplers are provided with a lug pin to hold them in place when coupled, and a chain connects the lug pin to the lever, so that movement of the lever raises the lug pin; until raised the knuckle is locked by the pin and will not couple. To make the coupling, when the equipment is in order, the lever to raise the pin can be operated with one hand from the side of the car, but it is necessary to enter between the cars to open the knuckle by hand, if closed. For this purpose, the plaintiff took hold of the lever on the refrigerator car with his left hand to raise the pin, and reached with his right hand to open the knuckle; but then discovered that the chain was broken so that the pin must be raised by hand instead of lever, to release the knuckle. In his position, this required instantaneous change of hands, to remove the pin with the right and open the knuckle with the left hand; he attempted this, but the cars came together before he could accomplish both operations and his left hand was crushed. The defect, opportunity for inspec-

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**tion by the car inspector, and neglect therein chargeable to the defendant, are undisputed facts; and it is undisputed that the plaintiff was not chargeable with duty as inspector, nor with notice of the defect. Upon submission of the several issues to a jury the verdict was for the plaintiff and judgment was recovered accordingly.**

Rudolph J. Kramer, for plaintiff in error.
George M. Morgan, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts). The questions raised by the various assignments of error are these: (1) Is the proof sufficient to establish jurisdiction, resting on diversity of citizenship? (2) Is the plaintiff chargeable under his testimony with contributory negligence as a conclusion of law? (3) Whether error appears in the instructions to the jury covered by exception.

1. The jurisdictional allegation in the declaration of citizenship on the part of the plaintiff is plainly defective, as it states that he is "a resident of the state of Illinois," but does not state his place of citizenship. In his testimony, however, preserved of record in a bill of exceptions, the plaintiff says, in reference to occurrences both before and after the commencement of the suit, that he was at "home" in Flora, Ill.; that "I live there." This proof is sufficient, under the authority of Sun Printing & Publishing Ass'n v. Edwards, 194 U. S. 377, 383, 24 Sup. Ct. 696, 48 L. Ed. 1027, to cure the defective averment. In that case the question of jurisdiction was certified, under like incidental statement by the plaintiff that he "lived in Delaware" and his family were there, and the sufficiency was upheld, where the averment was alike defective. The declaration mentions the defendant as "a foreign corporation and nonresident of the state of Illinois," so that diversity of citizenship appears, and the assignment for want of jurisdiction is overruled accordingly.

2. On behalf of the defendant, instructions were requested directing a verdict of not guilty, on the theory that negligence on the part of the plaintiff conclusively appeared as contributory cause of the injury; and error is assigned for denial of the several motions to that end. We are satisfied that the contention upon which they rest is untenable, and that the issue of contributory negligence was rightly submitted to the jury. True, the facts were undisputed, but the inferences to be drawn from them—whether the plaintiff exercised ordinary care and prudence in attempting to make the coupling under the circumstances—were clearly within the province of the jury. Under the testimony, the effort of the brakeman to open the knuckle with one hand (as needful), while the other hand engaged the lever to raise the pin, is surely not conclusive of want of ordinary care, when it appears that he was unaware of the broken chain, which prevented action of the lever. In so far as appears, the coupling would have been safely made, except for the defect referred to, and the attempt was no departure from the ordinary method, where the knuckle was either closed or not observed to be open. With the defendant chargeable with negligence for sending in the car with the broken chain, after

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opportunity for inspection and repair, and the plaintiff not chargeable with notice, but entitled to assume that it was in order, the defendant is without ground for complaint in the submission. So in respect of the contention that the broken chain was not the proximate cause of injury, we are of opinion that no error appears in the submission or instructions thereupon.

3. The entire charge to the jury is preserved in the record, and error is assigned upon portions of the instructions as not fully stating the issues and the rule to be applied under the evidence. Reading the instructions as a whole, we are satisfied that each of these objections to the instruction is without merit. All the issues were clearly defined and correctly submitted, as we believe, in the course of the charge; and if the portions referred to omit repetition of all the elements to be considered, the context supplies it in clear terms, without room for misunderstanding upon either issue.

No reversible error appears in the assignments, and the judgment of the Circuit Court is affirmed.

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(149 Fed. 100.)

## SIEGERT v. GANDOLFI et al.

(Circuit Court of Appeals, Second Circuit. December 4, 1906. On Rehearing, January 7, 1907.)

No. 34.

1. TRADE-MARKS—GEOGRAPHICAL NAMES—ANGOSTURA BITTERS.

Complainants adopted the name "Angostura" as the name of bitters originally manufactured by them in the town of that name in Venezuela, and continuously used the same thereafter, though the name of the town was subsequently changed. Complainants' bitters became widely and favorably known under such name. *Held*, that complainants were entitled to protection in the use of the name as against persons using it to create dishonest competition, though complainants could not obtain a monopoly in the use of the word as a trade-mark.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, §§ 78–82.

Use of geographical names, see notes to Hoyt v. J. T. Lovett Co., 17 C. C. A. 657; Illinois Watch-Case Co. v. Elgin Nat. Watch Co., 35 C. C. A. 242.]

2. SAME—UNFAIR COMPETITION—IMITATION OF PACKAGES.

Where defendants imitated both the name and bottles in which complainants' "Angostura" bitters were sold, the labels being similar, except that they disclosed the fact that defendants' bitters were made in Baltimore, Md., instead of Port of Spain, in Trinidad, where complainants' bitters were made, defendants were guilty of unfair competition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 83.]

3. SAME—RIGHT TO PROTECTION—FRAUDULENT REPRESENTATION.

Complainants manufactured and sold "Angostura" bitters under representations that it consisted of a mixture of certain bitter, aromatic,

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and carminative substances, together with alcohol added as a preservative solvent, and that the bitters did not contain any "intoxicating ingredients." An advertising circular contained certificates of physicians and customers, representing that the bitters were a valuable remedy for nearly all ills, and when mixed with water, beer, wine, and spirits, made a "splendid drink," and also that the bitters were free from dangerous ingredients and might be used by invalids, adults, and children to advantage. *Held*, that the statement that the bitters contained no intoxicating ingredients should be construed as referring to the herbs and simples of which it was composed, and that such representations were not so false and fraudulent as to deprive complainants of relief in a suit to enjoin unlawful competition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 94.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 139 Fed. 917.

Arthur Furber and Robert C. Morris (William M. Copeland, of counsel), for appellant.

J. B. Leavitt, for appellees.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

WALLACE, Circuit Judge. Notwithstanding the voluminous record and the elaborate briefs by which the controversy between the parties has been presented, the controlling questions of fact and law are few and simple, and permit the case to be briefly disposed of.

The action was brought by the sons and successors in business of Dr. J. G. Siegert, who was the original manufacturer of an aromatic bitters which became known as "Angostura Bitters," to restrain the defendants from selling a preparation made by C. W. Abbott, and put upon the market under the same name, in bottles and wrappings in imitation of those previously adopted by the Siegerts. The action was defended by Abbott, and may be treated as though it had been brought against him. The court below dismissed the bill of complaint upon the grounds that the Siegerts never acquired any right to use the name as a trade-name or trade-mark, that they had been guilty of fraudulent misrepresentations in offering their preparation to the public, and that Abbott had not committed any acts of unfair competition.

It appears that Dr. Siegert, a physician and surgeon, compounded and commenced the manufacture and sale of his bitters some years prior to 1846 at Angostura, a seaport town of Venezuela. In 1846 the name of the town was officially changed from "Angostura" to that of "Cuidad Bolivar." Nevertheless, the former name also survived, and the town has ever since been commercially designated to some extent by the original name. The bitters were originally sold under the name of "Dr. Siegert's Aromatic Bitters." In 1853 they began to command an extensive sale in foreign countries, and were commonly styled by dealers as "Angostura Bitters," doubtless because they originated at Angostura. By 1868 the name "Angostura Bitters" had come to signify in all parts of the world the bitters which had been and were then prepared and sold by Dr. Siegert and his son; and the

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name had been adopted by the Siegerts as one of the trade-names for their article. Between 1868 and 1872 it was used by them in their circulars to the trade and their advertisements to the public. In 1872 it was registered in the Patent Office under the law then in force by their agent for this country as a trade-mark for their bitters; and about this time it was used upon the labels of their bottles as the prominent trade-name of their bitters. In the meantime there had been some sporadic instances of imitation by others, but what had become known the world over as "Angostura Bitters" were the bitters of the Siegerts. In 1870 Dr. Siegert died. In 1872 another of his sons was taken into the firm, and in 1875 the firm moved their factory from Cuidad Bolivar to Port of Spain, in the Island of Trinidad.

Abbott, who as has been said is the real defendant, claims to derive his right to use the name, which had thus been adopted as the trade-name of the Siegerts, through the firm of Maynard & Co., who in the fall of 1872 began making bitters and putting them on the market under the name of "Angostura Aromatic Bitters." This firm put up their bitters in bottles of the same size and shape of the Siegerts' bottles, sometimes using second-hand Siegert bottles; and they wrapped the bottles in labels which were obviously designed to imitate the Siegert labels in their conspicuous features. In 1877 Abbott registered the name "Aromatic Angostura Bitters" as a trade-mark for the bitters. Subsequently in putting them on the market he dropped the word "Aromatic," and has since in his labels, circulars, and advertisements styled them "Angostura Bitters." Neither Maynard & Co. nor Abbott have ever directly represented that their bitters were the Siegert preparation, and they have always stated in their labels and advertisements that their bitters were manufactured by themselves at Baltimore. Nevertheless, we are satisfied that they used the name and simulated the Siegerts' bottles and labels to confuse the identity of their bitters with those of the Siegerts' preparation, and to lead the public to believe that in buying theirs they would be buying those originally made and sold by the Siegerts. In order to justify the use of the word "Angostura," they employed as one of the ingredients of their bitters a trifling infusion of Angostura bark.

The case is essentially in its facts like one which was considered by the Circuit Court of Appeals of the Seventh Circuit in Bauer & Co. v. Siegert, 120 Fed. 81, 56 C. C. A. 487, which was a bill in equity by the Siegerts to enjoin Bauer & Co. from unfair competition in using the word "Angostura," and from simulating their labels and the dress upon the bottles, and in which it was contended that the word "Angostura" could not be the subject of a trade-mark or a trade-name. But the court sustained the bill, and enjoined the acts complained of.

Undoubtedly the Siegerts did not, and could not, acquire such a monopoly in a geographical name as a trade-mark or trade-name as would entitle them to prevent others from using it under any circumstances. But it is sufficient to entitle them to relief that they used the name lawfully to designate their product until it became known to the trade by that designation, that by doing so they acquired a trade which was valuable to them, and that their business is being injured

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by acts of the defendants which create a dishonest competition by leading the public to believe that Abbott's bitters are the original bitters. This has long been the law in this circuit (Anheuser-Busch Brewing Association v. Piza [C. C.] 23 Blatch. 245, 24 Fed. 149), and has always been adhered to in this court. When the name of a place or a locality has been so long applied as a descriptive designation of the product of some manufacturer there that it has acquired a secondary meaning, and has come to be generally recognized in trade as signifying his particular product, it becomes so far his property that a business rival cannot appropriate and use it to induce purchasers to buy a product made elsewhere, or even made at the same place. This proposition is so well settled that any citation of authorities would be superfluous, but the case of French Republic v. Saratoga Vichy Spring Co., 191 U. S. 427, 24 Sup. Ct. 145, 48 L. Ed. 247, may properly be referred to. The syllabus in that case is as follows:

"Geographic names often acquire a secondary signification indicative not only of the place of manufacture but of the name of the manufacturer or producer, and the excellence of the thing manufactured or produced, which enables the manufacturer or owner to assert an exclusive right to such name as against every one not doing business within the same geographical limits; and even as against them, if the name be used fraudulently for the purpose of misleading buyers as to the actual origin of the thing produced or palming off the productions of one person as those of another."

If the geographical name has become a secondary designation indicative of the product of the particular manufacturer, it is as much entitled to protection as any arbitrary or fancy name which he might have selected; and the circumstance that the manufacturer may have removed his place of business, and is making his product in some other place, is of no more consequence than it would be if he had adopted the fancy name.

The court below was impressed that the Siegerts had been guilty of fraud in misrepresenting the therapeutic qualities of their bitters, and especially in falsely representing that they were free from all intoxicating ingredients. We cannot assent to these conclusions. The misstatements referred to are mainly contained in certain certificates of physicians and chemists embodied in an advertising circular issued by the Siegerts. Some of these certificates depict the bitters as a valuable remedy for nearly all the ills that flesh is heir to; but the extravagance of their laudations is sufficient to deprive them of any weight in the minds of those who read the more careful statements in the certificates which accompany them. Representations that the bitters when mixed with water, beer, wine, and spirits make a "splendid drink," that they are free from admixture with the dangerous ingredients "so commonly present in what are termed 'pick-me-ups,'" and are a useful, hygienic liqueur "that may be used by invalids and those in good health, by adults and children, with equal advantage," are hardly a sufficient basis for a charge of fraud. Medical experts have testified to the substantial truth of the statements; and it is not unreasonable to suppose that the Siegerts themselves came to believe that their own production which had acquired an unexampled populari-



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ty in all parts of the world was as remarkable in its curative properties as some of the chemists and physicians certified. The statement that the bitters did not contain "any intoxicating ingredients" evidently refers to the herbs and simples of which it was composed, as the accompanying statement is:

"They consist of a mixture of certain bitter, aromatic and carminative substances, together with alcohol, added as a preservative and solvent."

The defense of unclean hands comes with ill grace from a rival manufacturer who advertises his article in equally glowing and exaggerated terms, stating among other things that his bitters are "unequaled as a cure for liver complaint, dyspepsia, fever and ague, bilious, intermittent and remittent fevers," and "a sure remedy against Asiatic cholera and yellow fever."

Upon the whole case we are of the opinion that the complainants were entitled to an injunction restraining the defendants from using the word "Angostura," and from imitating complainants' labels and the dress upon their bottles, and to an accounting.

The decree is therefore reversed, with costs, and with instructions to the court below to decree conformably with this opinion.

On Motion for Rehearing.

PER CURIAM. In view of the fact that the opinion expressly states that the case is considered precisely as if it were brought against Abbott, we see no reason for the assumption, which is the basis of this application by the nominal defendants, that they are charged with dishonorable conduct.

The motion is denied.

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(149 Fed. 104.)

## WILLIAMS v. CHOCTAW, O. & G. R. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. December 5, 1906.)

No. 1,555.

1. TRIAL—MOTION FOR DIRECTION OF VERDICT.

On a motion to direct a verdict, the court must take that view of the evidence most favorable to the party against whom the direction is requested, who is entitled to the benefit of all fair and reasonable inferences from the testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 401, 402.]

2. MASTER AND SERVANT—INJURY TO SERVANT—DUTY TO OBSERVE DEFECTS IN APPLIANCES.

A railroad employé, working constantly with an engine in the yards, may not close his eyes to obvious and dangerous conditions or defects therein, and recover for an injury resulting therefrom; but, if an accident occurs, and he pleads ignorance, he must show that his ignorance was not only actual, but excusable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 710, 712, 718.]

3. SAME—ACTION FOR INJURY—CONTRIBUTORY NEGLIGENCE.

Plaintiff was foreman of a switching crew, working with an engine in railroad yards, and had used the same engine for a month, when he slipped from the footboard at the rear of the tender, at night, and was injured. It appeared that the footboard was defective, in that it sloped downward, and was also icy that night by reason of the leaking of the tank. Such defects had existed for some time, and plaintiff had worked

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**with the engine every day, and had ridden on the footboard. The engine was backing, making the position one of danger, and plaintiff was not compelled to occupy it at the time, but took it for greater convenience. *Held*, that he was chargeable with knowledge of the defects which he ought to have possessed in the exercise of ordinary care and observation, and was guilty of contributory negligence which precluded him from recovering for the injury.**

**[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 718.]**

In Error to the Circuit Court of the United States for the Western District of Tennessee.

E. G. Bell, for plaintiff in error.

E. E. Wright, for defendants in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit brought by Williams, the plaintiff below, against the defendant railroad companies, to recover damages for injuries received in the yards at Memphis, Tenn., while employed as foreman of a switch engine and crew. At the time of the accident Williams was on the rear end of the tender. The train was backing, so he was in front of it. Attached to the rear of the tender was a footboard. The night was cold and freezing. He desired to get off the train to deliver some bills and to see that a switch was all right. As he went to get off, his foot slipped on the footboard and he fell under the train, losing one leg and having the other badly mangled. He claimed in his petition that the footboard and the tank above it were defective; the footboard because the L-shaped irons which supported it at the rear of the tank, were bent inward, giving it a dangerous slope, and the tank because it leaked, allowing the water to trickle down on to the footboard, where it froze, creating an icy, slippery surface. Williams claimed he was not aware of the condition of the footboard, and, relying upon the companies having used ordinary care in providing a reasonably safe place and appliances for his use, stepped upon it, when the accident resulted without his fault. The court below directed a verdict for the defendants on the ground either that Williams knew or ought to have known of the condition of the footboard, and assumed the risk of using it, or was guilty of contributory negligence in using it under the circumstances, or both.

The rule is well settled that, where a motion is made to direct a verdict, the court must take that view of the evidence most favorable to the party against whom the direction is requested. In this case, Williams was entitled to receive the benefit of all fair and reasonable inferences from the testimony. Railway Co. v. Lowery, 20 C. C. A. 596, 74 Fed. 463; Mason v. Yockey, 43 C. C. A. 228, 103 Fed. 265; Riley v. L. & N. R. R. Co., 66 C. C. A. 598, 133 Fed. 904. It appears from the record that Williams was an experienced railroad man. He had been employed in the business for some 18 years, first as brakeman, and latterly as foreman of the switch engine and crew. As foreman he had charge of the switch engine and crew. The tender, with its appurtenances, was deemed a part of the switch engine. It was the duty of the engineer to inspect the engine each day when he took it out, reporting any defects, and it was also the duty of Williams to

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report any defects he might observe, either in the engine or the cars; but he was not obliged to inspect either. This engine had been in use in and about Memphis for about a month, and Williams had charge of it and the crew during that time. The accident occurred on the 27th of December. For two or three days before that date it had been raining, and on that date it turned cold, and in the afternoon began to freeze. The engineer, who had been in charge of the engine from the time it reached Memphis, testified that he had observed the slope in the footboard and the leak in the tender from the first, but did not report them, because he did not think they were dangerous. One of the brakemen, whose station was at the rear of the tender, testified that he had observed the slope and leak, and that an experienced man could tell, from stepping on the footboard, that it was sloping. Williams stated he had not been on the footboard the day of the accident prior to its occurrence, or for several days before, because it was raining and he rode in the cab. He admitted having been near the footboard on numerous occasions, and did not deny having been on it prior to the day of the accident, but testified he was not aware of the existence of the slope or the leak. He conceded it would have been his duty to report these defects if he had observed them, but contended it was the duty of the engineer both to inspect and to report, and, since the engineer did not report them, he insisted he had a right to rely upon the footboard being in a reasonably safe condition.

Conceding that the primary duty of inspection rested upon the engineer as the representative of the railroad companies, and that he should have reported these defects, so that the companies might have discharged their duty to use ordinary care to keep the footboard reasonably safe for the use of their employés, including Williams, nevertheless it was the duty of Williams, as a servant engaged in a hazardous occupation, to employ his faculties, as reasonably prudent men do, to ascertain the condition of the machinery and appliances provided for his use. In the case of latent defects he may rely upon the inspection of the companies; but in the case of open and patent defects he must take steps to protect himself or be held to have assumed the risk. He may not close his eyes to obvious and dangerous conditions and expect to recover in case of accident. If accident comes, and he pleads ignorance, he must show his ignorance was not only actual but excusable. Cunningham v. C., M. & St. P. Ry. (C. C.) 17 Fed. 882; Detroit Crude Oil Co. v. Grable, 36 C. C. A. 94, 94 Fed. 73; Reed v. Stockmeyer, 20 C. C. A. 381, 74 Fed. 186; McCain v. C., B. & Q. R. R. Co., 22 C. C. A. 99, 76 Fed. 125; Tuttle v. Milwaukee Ry. Co., 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114; Washington & Georgetown R. R. Co. v. McDade, 135 U. S. 554, 570, 10 Sup. Ct. 1044, 34 L. Ed. 235; Southern Pac. R. R. Co. v. Seley, 152 U. S. 145, 14 Sup. Ct. 530, 38 L. Ed. 391.

In the present case, the question is, not whether Williams actually knew of the slope and leak, but whether, in the proper and prudent use of his opportunities for observation, he could and should have known of them. Giving Williams the benefit of all he claims from the testimony, still the question recurs whether, if he had used his eyes when near the footboard and tank, and his sense of feeling when on

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the footboard, would he not have known, would not any ordinarily prudent man, under the circumstances, have known, that the footboard sloped and the tank leaked? We are unable, after careful consideration, to satisfy ourselves that this question can rightly be answered other than in the affirmative. Conceding the slope and leak were defects which caused the accident, and that Williams did not know of their existence, we are forced to the conclusion that any person of ordinary prudence, exercising reasonable care in the employment of the opportunities for knowledge open to Williams, would have discovered them under the circumstances of this case. The knowledge that he thus ought to have acquired by the proper and prudent use of his faculties the law imputes to him, and he must be taken to have assumed the risk resulting from the use of these defective appliances. Williams had charge of this switch engine for about a month. He was near this footboard and tank every day during that time. He was certainly on the footboard before the day of the accident. In the case of Mason v. Yockey, 43 C. C. A. 228, 103 Fed. 265, where a fireman, stepping on the iron apron between the engine and tender, which had become icy from water escaping from the tender through a defective valve, had slipped and fallen from the engine, receiving serious injuries, the action of the court below in permitting the case to go to the jury was sustained on the ground that the fireman had not been at work on the engine before during that winter, that he got on it at break of day on a cold winter morning, and was kept constantly employed up to the time of the accident in the discharge of his duties as fireman, being required to fire every two or three minutes. It will be observed that, when the defect became discoverable, the engine was out on the road, and the question presented to the fireman of assuming the risk of such a defect, when the alternative was to abandon the engine and train, was quite different from that presented where the engine is in the yard of the railroad company. Still we consider this a very close decision. Of a similar character is that in the case of Le Duc v. N. P. R. R. Co., 92 Minn. 287, 100 N. W. 108, in which the plaintiff's intestate, a switchman, fell from a defective footboard at the rear of the tender of a switch engine, and was run over and killed. It appeared that his duty required him to use the footboard, and that he had never been on it before.

Taking another view: The footboard on the rear of a tender, used when the engine is backing, occupies the same relative position that the pilot of an engine does to the train when it is moving forward. It is a place of danger, not to be used unnecessarily. Railroad Co. v. Jones, 95 U. S. 439, 24 L. Ed. 506; Kresanowski v. N. P. R. R. Co. (C. C.) 18 Fed. 229; Kane v. Erie R. R. Co. (C. C. A.) 142 Fed. 682.[1] An experienced employé, called upon to use it, would naturally, in the exercise of ordinary care, take steps to ascertain its condition, and the nature of the foothold it would afford in alighting from the train, before intrusting himself to it. This would be especially true after dark, on a rough track, in freezing weather, with the chance of ice on the footboard. In the present case, the testimony shows it was not necessary for Williams to use this footboard in front of the moving train in order to get off. He had been riding in the cab. He might have done so that night. No reason for the change was given.

[1] 73 C. C. A. 672.

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if, as he claims, he did not know the condition of the footboard, then he unnecessarily chose a place certainly of danger, and possibly of unusual danger, when one of safety was open to him. In doing this we think he acted negligently.

The judgment is affirmed.

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(149 Fed. 108.)

## WABASH R. CO. v. KITHCART.

(Circuit Court of Appeals, Eighth Circuit. November 21, 1906.)

No. 2,357.

1. MASTER AND SERVANT—INJURIES TO SERVANT—BRAKEMAN—PETITION—ALLEGATIONS OF NEGLIGENCE.

In an action for injuries, plaintiff, a brakeman, alleged that in complying with the orders of his superior he was compelled, by reason of a defective coupling rod, to step between the cars in order to uncouple them, and while doing so his foot was caught in an open unblocked frog in the track; that the injury was occasioned because of the negligent and careless construction of defendant's track in failing to properly block the frog, and that the accident was solely caused by reason of defendant's negligence in failing to properly construct and maintain its track at the point of the accident. *Held*, that the petition was insufficient to raise an issue of negligence in maintaining a defective coupling appliance.

2. SAME—NEGLIGENCE—UNBLOCKED FROGS.

Where, in an action for injuries to a brakeman by his foot becoming caught in an unblocked frog, there was undisputed proof that on some of the railroad systems in the state and elsewhere it was customary to leave frogs unblocked, and on others to block them, and the frogs on some parts of defendant's lines were blocked and on others not, and also that there was a fair difference of opinion among practical railroad men as to which was the safer practice, defendant's failure to block the frog in question did not constitute actionable negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 221.]

In Error to the Circuit Court of the United States for the Southern District of Iowa.

James P. Hewitt (Geo. S. Grover and Carr, Hewitt, Parker & Wright, on the brief), for plaintiff in error.

Halloran & Starkey and Thomas A. Cheshire, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. Kithcart recovered a judgment against the railroad company for personal injuries sustained in the state of Iowa while in its service and in the performance of his duties as a brakeman. The averments of negligence in his petition are contained in the following paragraphs:

"That in complying with the said orders of his said superior officer, he was compelled, by reason of a defective coupling rod, to step between the cars in order to uncouple the same, and while between the said cars, in the act of uncoupling the same, his foot was caught and held fast in an open or unblocked frog or guard rail in and on the track of the defendant company.

"That said accident and injury was occasioned the plaintiff because of the negligent and careless construction by the defendant company of its track, in failing to properly block the said frog or guard rail of the switch, located at the point and place of the happening of said accident.

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"That said accident occurred solely by reason of the carelessness and negligence of the defendant company, as stated above, in failing to properly construct and maintain its said track at said point of said accident, and the plaintiff was wholly free from contributing in any degree whatever to the same by reason of any negligent or careless acts upon his part."

At the conclusion of the evidence the court denied a request of the railroad company for a directed verdict in its favor, and also refused to give an instruction that there could be no recovery because of a defective coupling rod as a ground of negligence. On the contrary, the court instructed the jury that there were two charges of negligence in the petition, upon either of which a recovery might be had if the evidence warranted it—first, a defective coupling appliance, and, second, a failure to block the frog. In this the court erred. The petition does not charge the defective condition of the coupling appliance as a substantive ground of negligence. The first of the paragraphs quoted from the petition is not an assertion of negligence on the part of the company. It merely sets forth a reason why the plaintiff went between the moving cars, and its purpose was to relieve him from the charge of contributory negligence. Morris v. Railway, 47 C. C. A. 661, 108 Fed. 747. This is manifest, because there is nothing more in the averment than a bare statement that a coupling rod was defective. It is not averred that the company was in any wise negligent in respect thereof, and for aught that appears the company may have been most diligent in the performance of its duties of inspection and maintenance. The purpose of the pleader not to rely upon the defect except as mere inducement to plaintiff's action in going between the cars is further shown by his failure to aver either that the cars were employed in interstate commerce, so that the act of Congress in respect of safety appliances would apply, or that they were employed in commerce within the state, so that a statute of Iowa upon the same subject could be invoked. Moreover, the evidence received during the trial went no further than to show the bare fact that the safety appliances were defective. The other paragraphs of the petition afford further proof, if any is needed, that the plaintiff rested his case solely upon a charge of negligence in respect of the condition of the track. In the second of those quoted he directly charges that the accident and the injury were occasioned because of the failure to properly block the frog or guard rail of the switch, and in the third he says that the accident occurred solely by reason of negligence in failing to properly construct and maintain its track at the point of the accident. Counsel endeavor to escape from this obvious conclusion by claiming that such averments were mere "opinions and conclusions of law," and should therefore be wholly disregarded. Were this true (though manifestly it is not), the plaintiff would have a petition stripped of every averment of negligence on the part of the defendant, and his right of recovery would be rested upon inadmissible inferences and presumptions.

As to the failure of the railroad company to block the frog at the switch where the plaintiff was injured: Without recapitulating the testimony of the witnesses, it is sufficient to say that there was undisputed proof that on some of the railroad systems in Iowa and else-

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where it was the custom to leave frogs unblocked, and on others it was the custom to block them. The frogs on some parts of the defendant's lines of road were blocked, and on others not blocked. The particular frog in which plaintiff's foot was caught had never been blocked. The evidence also showed that there was a fair difference of opinion among practical railroad men as to which was the safer practice. The case was therefore brought fully within the rule announced by the Supreme Court and by this court in Southern Pacific R. Co. v. Seley, 152 U. S. 145, 14 Sup. Ct. 530, 38 L. Ed. 391; Morris v. Railway, 47 C. C. A. 661, 108 Fed. 747; Kilpatrick v. Railroad, 57 C. C. A. 255, 121 Fed. 11, affirmed by the Supreme Court in 195 U. S. 624, 25 Sup. Ct. 789, 49 L. Ed. 349; Gilbert v. Railway, 63 C. C. A. 27, 128 Fed. 529.

When such a diversity of theory and practice in the construction and maintenance of railroads reasonably exists, a company confronted by the problem is at liberty to adopt that course which, in the judgment of its officers, is least productive of danger to all whose safety is to be considered, and its selection of plan or method is not at the risk of being held guilty of negligence. In the Kilpatrick Case the petition charged that the railway company negligently allowed the coupling appliances on the cars to become defective and out of repairs; that because thereof the plaintiff's husband, a brakeman, had to go between the moving cars to uncouple them; that while doing so, and in the exercise of due care, his foot was caught in the unblocked space between a guard rail and a main rail of the track, and he was so injured that death ensued; that the unblocked space was dangerous, and the company was negligent in so maintaining it. At the trial, however, the plaintiff's attorneys stipulated that the failure to block the frog was the proximate cause of the injury, and that plaintiff would rely solely thereon, and not upon the other ground, namely, that the coupling appliances were out of repair. It will at once be perceived that this stipulation reduced the case to the position occupied by the one at bar. At the conclusion of the evidence in that case the trial court directed a verdict for the defendant upon the authority of Southern Pacific R. Co. v. Seley, supra. The judgment which followed was affirmed by the Court of Appeals in the Indian Territory (64 S. W. 560), by this court, and finally by the Supreme Court, all holding that the Seley Case was controlling.

In Union Pacific R. Co. v. James, 6 C. C. A. 217, 56 Fed. 1001, affirmed in 163 U. S. 485, 16 Sup. Ct. 1109, 41 L. Ed. 236, relied on by plaintiff, the principle announced in the Seley Case and in the cases which follow it was not invoked. The sole issue tried was whether a particular frog was blocked or unblocked at the time of the accident, and the trial court assumed in its charge to the jury that the unblocked frog was an unsafe appliance, and constituted negligence in itself. No exception was taken to that feature of the charge, and its correctness was not reviewed by the appellate courts.

The request of the Railroad Company for a directed verdict should therefore have been granted.

The judgment is reversed, and the cause is remanded for a new trial.

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(149 Fed. 194.)

## PAGE et al. v. ROGERS.

(Circuit Court of Appeals, Sixth Circuit. December 4, 1906.)

No. 1,570.

1. APPEAL—MANDATE—CONSTRUCTION.

Where the mandate on a former appeal provided that appellants were liable for a sum sufficient to "pay all debts of every class which had or might be proved against the bankrupt, and the expenses of the trustee, his fee, and costs," provided the aggregate did not exceed the amount of the preference received by appellants' testator, appellants were properly charged with a reasonable counsel fee to the trustee's attorney.

2. BANKRUPTCY — PREFERENTIAL PAYMENTS — EXPENSES OF ADMINISTRATION—COUNSEL FEES.

The reasonable fee of counsel employed by a bankrupt's trustee to recover a voidable or fraudulent preference made by the bankrupt constitutes a part of the trustee's expenses, and, as such, a part of the costs and expenses of administration, entitled to preferential payment.

3. SAME—EXCESSIVE ALLOWANCE.

Executors were held liable to repay to a bankrupt's trustee, of an alleged preference, a sum sufficient to pay all debts of every class proved against the bankrupt, and the expenses of the trustee, his fee, and costs. A fee of $15,000 was allowed to the trustee's attorney, but the executors' total liability was more than $7,000 less than the aggregate of the debts and expenses, including the allowance to counsel. *Held*, that such allowance was not excessive, in so far as such executors were concerned.

Appeal from the District Court of the United States for the Eastern District of Tennessee.

King, Waters & Page and Brown & Spurlock, for appellants.
Williams & Lancaster and Pritchard & Sizer, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

PER CURIAM. This is a second appeal. The opinion upon the first appeal states the case. 140 Fed. 596.[1] In pursuance of our decree modifying the decree of the court below, the district judge directed a special master to report the amount of claims proved or provable against the bankrupt, and the costs and expenses of the administration of the bankrupt estate, including fees of counsel for the bankrupt's trustee in this case. The master reported that the total amount of claims and costs and expenses, including trustee's counsel fees, was $78,086.-78. The total liability of the estate of Thomas Merriam to the bankrupt's trustee he reported at $70,891.54, including interest to January 15, 1906. Upon this basis there was no surplus over and above the liabilities of the bankrupt's estate, and no room for a refusal to direct the payment of any sum less than the full liability of Thomas Merriam to the trustee.

But the appellants assign as error the allowance of $15,000 as counsel fees to the counsel employed by the trustee, first, because they say that under the mandate of this court no counsel fees were allowed. This is a mistake. We expressly held that the appellants were liable for a sum sufficient to "pay all debts of every class which have been

[1] 72 C. C. A. 164.

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or may be proven against the bankrupt and the expenses of the trustee, his fee, and the costs," provided the aggregate did not exceed the amount of the preference received by the testator, Thomas Merriam. The reasonable fee of counsel employed by the trustee to recover a voidable or fraudulent preference made by the bankrupt constitutes a part of the trustee's expenses, and as such a part of the costs and expenses of administration, entitled to preferential payment. Davidson v. Friedman, 140 Fed. 853, 72 C. C. A. 553. These counsel fees were, therefore, a part of the trustee's expenses, and allowable under our mandate.

It is next objected that this allowance was excessive. We are not altogether prepared to approve of the large compensation allowed counsel, in view of the strong admonition in the direction of economy found in the bankrupt law. But if we assume that, under the peculiar mandate of this court, the district judge was authorized to refer the question of the aggregate sum necessary to pay all probable claims, costs, and expenses to a special master for a report, and that we would be authorized to consider an exception to an allowance for the counsel fees for the attorneys employed by the bankrupt's trustee upon the ground that it was so grossly excessive as to be an abuse of the sound discretion of the court below, we see no sufficient reason under the facts of this case for doing so. The total liability of the appellants is more than $7,000 less than the aggregate of the debts and expenses, including this allowance to counsel. The result is that about one-half of this allowance is paid by the creditors, who are not complaining. Unless, therefore, we should hold that this allowance was excessive to the extent of more than one-half, it would not benefit appellants. That we are not willing to do.

All of the assignments are overruled, and decree affirmed.

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(149 Fed. 196.)

## UNITYPE CO. v. LONG.

(Circuit Court of Appeals, Sixth Circuit. November 22, 1906.)

No. 1,462.

APPEAL AND ERROR—REHEARING—TIME FOR FILING PETITION.

The rule of the Circuit Court of Appeals which requires a petition for rehearing to be filed within 30 days after the filing of an opinion is one of convenience, and should not be enforced where the point on which a rehearing is asked is a reversal of the authority upon which the decision was based after the time for filing of the petition had expired, but before the court had lost jurisdiction over the judgment by the expiration of the term.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3232.]

On Petition for Rehearing.

For former opinion, see 143 Fed. 315, 74 C. C. A. 453.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

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LURTON, Circuit Judge. A petition to rehear was filed in this case before the close of the last term, and our mandate recalled, and a rehearing ordered for the first week of the present term. We held in the opinion filed herein, upon the authority of Dolle v. Cassell, 135 Fed. 52, 67 C. C. A. 526 (a case decided by this court), that a conditional sale of personal property, retaining the title until the purchase price was paid, was a void agreement as against the creditors of the buyer and his trustee in bankruptcy when not filed as required by section 4155–2, Rev. St. Ohio, 1906. Our opinion was subsequently overruled by the Supreme Court, and our judgment reversed, and the agreement retaining title to secure the price held valid and enforceable against the bankrupt's trustee.

It follows that the order of affirmance heretofore made will be set aside, and the judgment of the bankruptcy court reversed. The petition to rehear was filed after the time within which rule 29 (90 Fed. lix, 31 C. C. A. cvi) requires it to be filed. But the case is one which could be carried to the Supreme Court. That our judgment would be there reversed, there can be no doubt. The rule which requires a petition to rehear to be filed within 30 days after the filing of an opinion is a rule of convenience, and should not be enforced where the point upon which a rehearing is asked is a reversal of the authority upon which our decision was made after the time for a petition to rehear, but before we had lost jurisdiction over the judgment by the expiration of the term.

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(149 Fed. 197.)

## E. EPPSTEIN & CO. v. WILSON.

(Circuit Court of Appeals, Fifth Circuit. November 29, 1906.)

No. 1,522.

BANKRUPTCY—LIENS—UNRECORDED CHATTEL MORTGAGE.

The failure to record a chattel mortgage under the provisions of Rev. St. Tex. 1895, art. 3328, which, under the state decisions, does not affect its validity as between the parties or as against general creditors, does not render it invalid as against the trustee in bankruptcy of the mortgagor by virtue of Bankr. Act July 1, 1898, c. 541, § 67a, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449].

Petition for Revision of Proceedings of the District Court of the United States for the Northern District of Texas.

F. M. Etheridge and Rhodes S. Baker, for petitioner.

J. W. Stitt, for respondents.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. On the 4th day of May, 1905, one Cleve McNeil, being indebted to E. Eppstein & Co. in the sum of $2,822.85, balance due on a previous chattel mortgage, and $1,661.47 on an open account and $60 for rent, executed and delivered to E. Eppstein & Co. his note for $4,544.32 with interest from date at 10 per cent.; and, to secure said note he executed on the same day a chattel mortgage, bearing no date upon its face, upon certain bar fixtures in a certain saloon in Quanah, Hardeman county, Tex. Six days afterwards, Cleve McNeil

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was, on his own petition, adjudged a bankrupt. E. Eppstein & Co. proved the execution of the aforesaid note and mortgage, and asked to have the same allowed with full recognition of the mortgage lien. To the allowance of the claim the trustee made objection as follows:

"(1) That the alleged lien attempted to be asserted by claimant is void, because when given bankrupt was insolvent. (2) Because the alleged lien was given within four months next preceding the filing of bankrupt's petition herein. (3) Because neither of the mortgages on which claimant relies were registered as required by law, and are therefore void as against creditors and against the trustee of this estate. (4) That the trustee reduced the property on which the lien is asserted to his possession immediately on his qualification as such trustee of this estate and prior to the filing of the claim herein contested as a secured claim. (5) That claimants by withholding said alleged mortgages from proper registration and record aided said bankrupt in practicing a fraud on his other creditors, by making it appear that his assets were unencumbered, thereby inducing credit from creditors other than claimants, which would not have been extended had said mortgages been legally registered."

The finding of the referee was that the claim of indebtedness under the note was a lawful, just, and valid indebtedness of the bankrupt, and lawfully provable therein; that the chattel mortgage, though otherwise valid, was not duly registered as a chattel mortgage in Hardeman county prior to the institution of proceedings in bankruptcy, and therefore the claim of lien thereunder should not be allowed. On review before the District Court, the finding of the referee was sustained. In due time E. Eppstein & Co., filed this petition for revision. If the only question below was as to the validity of the mortgage lien because it was not registered in Hardeman county, the decision of the court was erroneous. See Meyer Bros. Drug Co. v. Pipkin Drug Co., 136 Fed. 396, 69 C. C. A. 240; York Manufacturing Co. v. Cassel, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782. Counsel for respondent argue in this court that the mortgage lien was and is invalid, because it was given for a pre-existing indebtedness when the grantor was insolvent and within six days before the bankruptcy. The referee does not find that the bankrupt was insolvent at the time the mortgage was executed or that there was any fraud in the inception or execution of the mortgage.

Under the facts as presented, we are constrained to reverse the decree of the bankruptcy court, and direct the allowance of the lien claimed by the petitioner, and it is so ordered.

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(149 Fed. 198.)

## HERDIC v. MARYLAND CASUALTY CO.

(Circuit Court of Appeals, Third Circuit. December 3, 1906.)

No. 22.

INSURANCE—ACCIDENT POLICY—CONSTRUCTION.

An accident policy recited that it insured against bodily injuries sustained through external, violent, and accidental means, and in a subsequent clause provided that it did not cover death from disability resulting from mineral, animal, vegetable, gaseous, or any other kind of poison, but, subject to its conditions, covered death or disability resulting from

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**septicæmia, etc. *Held*, that the policy did not cover death from septicæmia ensuing from a surgical operation for appendicitis.**

**[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1175.]**

**Buffington, Circuit Judge, dissenting.**

In Error to the Circuit Court of the United States for the Middle District of Pennsylvania.

For opinion below, see 146 Fed. 396.

Seth T. McCormick, for plaintiff in error.

C. E. Sprout and John E. Cupp, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

DALLAS, Circuit Judge. The Circuit Court sustained the demurrer of the defendant in that court (and here) to the statement of claim of the plaintiff below, wherein she alleged that the defendant, on the application of Carl Herdic (her husband), had issued a policy of insurance, made part of her statement, by which, as she averred, the defendant "did insure Carl Herdic in the sum of $5,000 against death resulting from septicæmia"; and the question was, and is, whether the policy sued on did insure against death resulting from septicæmia not caused by "accidental means," but ensuing upon a surgical operation for appendicitis.

The policy is an accident policy, and Carl Herdic could not have conceived it to be anything else. The company he applied to was a "casualty company." His application was for an "accident policy," and the policy itself was so designated, both on its face and by indorsement. Presumably such a policy would be intended, and understood, to insure against bodily injuries through accidental means, not against death from disease; and accordingly we find at the outset of this one, and in what may be called its cardinal clause, the statement that the company issuing it did thereby insure against "bodily injuries * * * sustained * * * through external, violent and accidental means." This language, of course, is not inclusive of death from septicæmia, when not resulting from accident; and in our opinion the subsequent clause upon which the plaintiff in error relies should be construed in harmony with it, and with the general character of the entire instrument as a policy of accident, and not of life, insurance. That subsequent clause is:

**"(4) This policy does not cover death nor disability resulting from mineral, animal, vegetable, gaseous, or any other kind of poisoning, except as hereinafter stated; but, subject to its conditions, covers death or disability resulting from septicæmia, freezing, sun stroke, drowning, hydrophobia, choking in swallowing, and death only, as the result of an anesthetic, while actually undergoing a surgical operation at the hands of a duly qualified regular physician."**

This clause is not to be so interpreted (in the event of death from septicæmia) as to render inoperative the previously expressed and broadly characterizing limitation of the entire insurance to bodily injuries sustained "through external, violent and accidental means." It was not designed to transform the policy from an accident one into one of restricted life insurance; and we do not believe that Mr. Herdic was, or could have been, misled into supposing that it had that effect.

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This, however, has been so satisfactorily shown by the learned judge of the court below as to render any more extended discussion of the subject by us unnecessary. See Herdic v. Maryland Casualty Company (C. C.) 146 Fed. 396.

The judgment is affirmed.

BUFFINGTON, Circuit Judge, dissents.

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(149 Fed. 200.)

## AMERICAN CAN CO. v. WILLIAMS.

(Circuit Court of Appeals, Second Circuit. November 24, 1906.)

No. 176.

INJUNCTION—RECEIVER OF NATIONAL BANK—DIRECTION TO RETAIN FUNDS PENDING SUIT.

It is a proper exercise of discretion on the part of a Circuit Court to enjoin a receiver of a national bank from transmitting a fund in his hands to the treasurer of the United States pending the determination by the court of a preferential claim thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 86-90.]

Townsend, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Western District of New York.

F. F. Oldham and F. W. Stevens, for appellant.

J. M. Mitchell, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The majority of the court are satisfied that it was a proper exercise of discretion on the part of the Circuit Court to retain the fund within the jurisdiction until it shall have been determined, at final hearing, to whom it belongs.

TOWNSEND, Circuit Judge. I dissent from the opinion of the majority of the court. The order in question enjoins the receiver "from disposing in any manner of any funds in his hands as receiver of the Fredonia National Bank by transmission to the Treasurer of the United States or otherwise, so as to reduce" the amount claimed by the plaintiff as a preference in the pending suit.

The federal statute makes it the duty of the defendant to take possession of the assets of the insolvent institution, and to pay over all moneys resulting therefrom to the Treasurer of the United States, subject to the order of the Comptroller. There is no evidence that the defendant is doing or threatens to do any act in violation of the plaintiff's right. It would seem from the language of section 5236 of the Revised Statutes [U. S. Comp. St. 1901, p. 3508] that the comptroller, and not the defendant, would be the proper person to pay the plaintiff's claim if it were finally sustained. In the absence of evidence that unless the injunction issue there will be an invasion of the plaintiff's rights, there is no sufficient justification therefor. The right to a pre-

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liminary injunction is not granted ex debito justitiæ, but the application is addressed to the sound discretion of the court. The discretion is not an arbitrary one, but is to be exercised subject to the established principles of law. High on Injunctions, §§ 11, 13.

It is to be assumed that the receiver, the Treasurer and the Comptroller will execute their duties according to law. I am of the opinion, therefore, that no adequate ground has been shown to justify the interference by injunction with the executive officers of the Government in the discharge of their duties in accordance with the statute.

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(149 Fed. 201.)

## WILDMAN MFG. CO. v. ADAMS TOP CUTTING MACH. CO.

(Circuit Court of Appeals, Third Circuit. November 20, 1906.)

No. 16.

CONTRACTS—BREACH—IMPLIED CONDITION.

A contract by which one party was constituted the sole manufacturer and the sole sales agent for a machine under a patent owned by the other, and required to manufacture and have ready for delivery at least 50 machines each year, provided there was sale for such number, placed upon such agent by implication the duty of exercising reasonable diligence in endeavoring to market the machines, and rendered it liable for a breach of the contract if by reason of its failure to do so the required 50 machines were not manufactured and sold each year.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 145 Fed. 576.

Dimner Beeber, for plaintiff in error.

Ellis Ames Ballard, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. This is a writ of error to the Circuit Court for the Eastern District of Pennsylvania. In that court the Adams Top Cutting Machine Company brought suit against the Wildman Manufacturing Company to recover, first, the value of certain jigs, patterns, and designs, and, secondly, damages for breach by the Wildman Company of its duty as selling agent of certain knitting machines for the Adams Company. The Adams Company, being the patentee of a certain machine for cutting the tops of knit hosiery, entered into a contract with the Wildman Company on June 14, 1891, whereby the Wildman Company agreed to manufacture and sell such machines for five years. In consideration of $3,500 paid by the Adams Company, the Wildman Company agreed to make for it all the jigs, patterns, and designs required to build this machine. The money was paid and the articles manufactured. In that respect the contract provided:

"It is further agreed that said jigs, patterns, designs, etc., shall be the property of the party of the second part, but shall never be delivered to the party of the second part, and shall always be and remain in the possession of the said party of the first part, excepting, first, in the event of the voluntary

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abandonment of this contract by the party of the first part within three years from the date hereof, and, second, in the event that the party of the first part shall fail to manufacture and furnish, provided there be sale for the same, fifty (50) machines each year for the first two years, unless prevented by circumstances over which it has no control. In either of the above circumstances the said jigs, patterns, designs, etc., shall be delivered over to the party of the second part."

The Adams Company averred the Wildman Company, although there was sale for the same, failed to manufacture and furnish such 50 machines yearly for each of said years, and by reason thereof it was entitled to demand, and had demanded, possession of said jigs, etc., or payment of $3,500 therefor, but the defendant refuses delivery or payment. This constitutes the first claim for damages.

As pertinent to the second claim, viz., to recover damages for breach of duty as selling agent, the contract provides:

"The party of the first part agrees to manufacture the Adams Top Cutting Machines for the party of the second part and become their sole manufacturers and sole selling agents for a period of five years, with the privileges of the party of the first part to renew this contract and extend the same for a further period of five years. * * * The party of the first part agrees to sell as agents of the party of the second part said machines, when so manufactured, at the price of seven hundred and fifty dollars ($750) f. o. b. cars at Norristown Pennsylvania, or for a price to be fixed by the party of the second part. All billheads shall contain the name of the party of the first part as sole manufacturers and sole agents for the party of the second part. * * * All selling expenses which the party of the first part may have to be borne by the party of the first part. * * * The party of the first part agrees to furnish and have made for sale, unless prevented by circumstances over which said party has no control, at least fifty (50) machines each year, provided there be sale for said number of machines. Should the party of the first part fail to manufacture and deliver one hundred machines sold or leased, unless prevented by circumstances over which said party had no control, in the first two years, then the party of the second part shall have the privilege to cancel the agreement, or take steps to place agents for the purpose of trying to increase the manufacture and sale of the machines, at their option. The party of the first part agrees to use the customary prudence and discretion in making sales, but shall not guaranty any sales, and should any losses be incurred the party of the second part agrees to pay to the party of the first part the price of manufacture, as above provided for. The party of the second part shall have the right to reject all orders of intended purchasers whose financial responsibility may be doubtful in the opinion of the party of the first part. The party of the first part agrees to make monthly reports and returns for all sales made, and liquidate monthly on the basis of such returns, and in so liquidating the party of the second part agrees to allow the party of the first part to deduct the price of manufacture and commissions, as aforesaid, on payments made on consummated sales."

The contention of the Adams Company was that defendant failed to discharge its duty as manufacturer and as selling agent, in that it did not, with due diligence and promptness, either manufacture the machines needed for sales, or sell the machines it could have sold.

It will be seen that the underlying question affecting the right of the plaintiff to recover on both these claims was the defendant's obligation as selling agent. In that respect the court said:

"Without any special provision in the contract to that effect, it is implied that the Wildman Company, having accepted the position of selling agent, and especially as being the sole selling agent, so that nobody else could put this machine on the market but itself, and to exercise reasonable diligence and care in endeavoring to market this machine."

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In view of the foregoing provisions, we agree with the court below that the contract constituted the Wildman Company the selling agent of the Adams Company, and the obligation to reasonably perform all the duties incident to such a relation rested upon it. We are also of opinion the defendant had no cause to complain of the court's instructions as to its liability for damages for failure to perform its duty as such agent. Not only did the judge carefully call the jury's attention to the necessary delay in perfecting and manufacturing the device, to the difficulties incident to the introduction of a new and untried article (elements that were in defendant's favor), but he referred to the fact that, while 50 machines was the maximum which defendant could be required to make, it was not bound to manufacture any for which there was no sale. The language of the charge was:

"Their contract was that they would provide, manufacture, and have ready for delivery fifty machines a year for the first two years, provided there was a sale for the same, and that is an exceedingly important matter for the jury to consider. Taking all these matters into consideration, was there a sale for as many machines as that? Can it be said reasonably and fairly, and in view of all the evidence, that there was a market for as many machines as that? If there was, then the duty of the defendant was to supply that market. If there was no such market, their contract is not broken by their failure to furnish those machines. They were only bound to furnish the market up to that maximum. They were only bound to furnish up to a certain number of machines in case there was a sale for them. If there was only sale for twenty-five machines, they were only bound to furnish twenty-five. They were not compelled to pile up a lot of machines on their hands for which there was no sale, and which would only have to be stored in their plant. That was the reason, no doubt, that this provision was put in, that unless there was a sale for this machine, they were not compelled to market them."

So, also, in regard to the other branch of the case, viz., the right of the plaintiff to recover the value of its jigs, etc., which were in the defendant's possession. In that regard the court instructed the jury the plaintiff was not entitled to recover possession of them, or their value if possession was denied, unless there was sale for 50 machines, and the defendant failed to make them. In that respect the court said:

"It is said that the Wildman Company has failed to manufacture those fifty machines each year for the first two years, and about this there is no dispute. However, it is also said that there was a sale for these machines, and that therefore this second contingency has come to pass. You will have to determine how that is, in the light of the instructions that I shall give you hereafter upon this clause, and if you find that there was a sale for those machines, that fifty of them could have been sold for the first two years, and that the Wildman Company failed to manufacture them and furnish them as their contract called for, then this second contingency may have to come into operation, and the plaintiff may be entitled to recover the fair value of those jigs, patterns, designs, and so forth. That is the first branch of the plaintiff's claim."

We are of opinion that the construction thus placed upon this contract by the court was correct, and presumably the jury acted upon it in reaching their verdict.

The assignments of error not being sustained, the judgment of the court below is affirmed.



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(149 Fed. 204.)

## WARD et al. v. WARD et al. (two cases).

(Circuit Court of Appeals, Second Circuit. August 11, 1906.)

Nos. 61, 62.

EQUITY—REHEARING—NEWLY DISCOVERED EVIDENCE.

A party will not be given leave to file a bill of review and for a rehearing on the ground of newly discovered evidence, where such evidence is hearsay or otherwise inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 1091–1094.]

On Motion for Stay and for Rehearing.

For former opinion, see 145 Fed. 1023, 74 C. C. A. 146.

Henry M. Ward and Austin G. Fox, for appellants.

Before WALLACE and TOWNSEND, Circuit Judges, and HOLT, District Judge.

PER CURIAM. The motion of the appellant to stay the entry of the decree affirming the decree of the Circuit Court and withhold the issuance of a mandate pending an application by the complainant to the Circuit Court for leave to file a bill of review and for a rehearing upon the ground of newly discovered evidence should be denied, if for no other reason because the alleged newly discovered evidence is merely hearsay testimony, and would be inadmissible if objected to, and entitled to no weight if received without objection. The declaration of the deceased witness was not made in the course of the proceeding to which his agency extended, but was made many years after his relation to the proceeding had terminated.

Motion denied.

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(149 Fed. 204.)

## FIRST NAT. BANK OF BEAUMONT v. EASON.

(Circuit Court of Appeals, Fifth Circuit. November 29, 1906.)

No. 1,597.

BANKRUPTCY—PROVABLE CLAIMS—AMOUNT OF DEBT.

A creditor holding the note of a bankrupt, and, as collateral security therefor, another note on which the bankrupt is also liable, is not entitled to prove his claim against the estate in bankruptcy for both, but only for the amount of the actual indebtedness to him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 513.]

Appeal from the District Court of the United States for the Eastern District of Texas.

Cone Johnson and Jas. M. Edwards, for appellant.

Ben B. Cain and W. Frank Knox, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The appellant has two obligations of the bankrupt, one is on a note of $15,000, of which the bankrupt was maker, the other is on an indorsement on a forged note for $15,000, given as

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collateral to secure the first-mentioned note. The appellant seeks to prove both obligations against the bankrupt's estate. There was only one consideration, really only one debt, and the appellant is entitled to only one satisfaction. The payment of either obligation would extinguish the other. The District Court held that the appellant could not prove both and thus establish a double liability against the bankrupt's estate.

The decree appealed from is affirmed.

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(149 Fed. 205.)

## BELL v. MacKINNON et al.

(Circuit Court of Appeals, Second Circuit. November 7, 1906.)

No. 138.

1. PATENTS—SUIT FOR INFRINGEMENT—DEFENSE OF ANTICIPATION.
   The defense of anticipation will not be considered in a suit for infringement of a patent where it is supported by the introduction of a number of prior patents for complicated machinery without any explanatory testimony.

2. SAME—INFRINGEMENT—KNITTED FABRIC.
   The Bell patent, No. 599,438, for a knitted fabric, if conceded patentable novelty, is of very narrow scope, and is not infringed by a fabric which has neither the groups of short and long loops of plush thread of the specification, nor the short and long loops of the claim.

Appeal from the Circuit Court of the United States for the Northern District of New York.

Appeal from decree, sustaining the validity of the second claim of complainant's patent, No. 599,438, granted February 22, 1898, to Winslow M. Bell, for improvement in knitted fabrics, and finding infringement and granting an injunction.

Milton E. Robinson, for appellants.

J. E. H. Hyde, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The specifications and drawings of the patent in suit are indefinite and incomplete, anticipation is claimed, but the defense is only suggested by injecting a large number of prior patents into the record without any explanatory testimony, and, apparently for this reason, the court below has filed no opinion, except a statement that the claim in suit is valid and infringed. If an examination of the prior art were necessary to the decision of the case, we should not sustain the defense of anticipation upon such mere production of patents for complicated combinations of machinery. It is evident, however, from the file wrapper, the language of the specifications, hereafter quoted, and the testimony, that the patent is a narrow one. It concerns knitted fabrics having diversified patterns. The 31 claims in the original application were divided between claims for methods for forming knitted fabric and for the fabric itself. After repeated rejections and amendments, the claim in suit was inserted and allowed for a special construction of fabric.

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The patent is printed with two claims. The court below held the first of these claims void. This claim was, in fact, erased by the applicant before the issue of the patent, so that the patent contains but one claim—the claim in suit.

Said claim is as follows:

"A fabric consisting of body-threads, and two or more plush-threads, said plush-threads engaging with the body-threads in alternately short and long loops, the long loops of one plush-thread lying over the short loops of the other plush-thread and vice versa, and all of said long loops lying higher than the short loops above the body portion of the fabric, substantially as described."

The specification states, inter alia, as follows:

"My invention relates to improvements in knitted fabrics, in which certain cords or threads, hereinafter designated 'plush-threads,' are so knitted into the body of the fabric as to form definite contrasts, figures, or designs, either in color, shape, relief, material, or all four, and allow of being suitably napped thereafter, if desired, without injury to the body fabric. * * * Some patterns, such as straight and diagonal stripes, can be produced by a slight alteration in the arrangement of parts of the present plush-machines. I attain these objects in the following manner: * * * My improved fabric differs from those previously used in having a plush-thread surface, which consists of alternating groups or series of loops of said plush-threads, some of which loops are shorter than the others, such groups being arranged so as to be intermittently and recurrently visible and invisible, the relation of such groups to each other and the number of loops in each group being varied at pleasure, whereby various patterns or designs may be formed upon the surface, as desired. My new method of making such a fabric consists in interlacing plush-threads through loops of the binding-threads of said fabric and in so arranging the plush-threads that they will appear above the surface of the fabric in groups or series of loops, each group alternating with another group of a different height or length; for instance, one group, Z, composed of long high loops and a neighboring group, Y, composed of short low loops, and the groups being separated from each other by short loops of plush-threads tightly interlaced with the body fabric.

"Referring to Fig. 1, A represents the binding-thread composing the foundation texture or body of the fabric, such as knit shirting or hosiery, for example, and which may be of any suitable material. Into this the plush-thread, B, which may be of any suitable material and color, is interlaced or knit, as at e, in such a manner as to form a long loop raised considerably above the general surface of the fabric. These loops may be knit in series or groups of two or more, as may be desired. At E this plush-thread is interlaced or knit in such a manner as to form a short loop, B', raised only slightly above the body as compared with the long loop. These short loops may be also knit in series or groups. In this figure there is a group of three long high loops and one of four short loops of medium height and short loops, E'', tightly interlaced with the body fabric, and between each of the long or short loops. It will be seen that this method of knitting will permit of infinite varieties of design as regards the outline of the figure thus formed in relief by the difference in height of the respective loops or series of loops. At the same time, if desired, a second plush-thread, C, which may be of different color or material, or both, may in the same way be interlaced or knit into the body, A, and loops, BB', so as to form a similar series or group of short loops, C, under the long loops formed by the plush-thread, B, and in a similar manner several such threads may be knit so as to produce several series or groups of different colors and materials."

The patentee proposed to produce his fabrics "by a slight alteration in the arrangement of parts of the present plush-machines." The language of the specifications indicates that he thought that the novel fea-

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ture of his invention consisted in the formation of an improved fabric with a novel pattern surface by means of groups of floated loops separated from each other by short loops, not floated, but "tightly interlaced with the body of the fabric;" and the patentee evidently intended that this fabric should comprise groups of long loops followed by groups of shorter loops extending transversely across the fabric, end to end; that is, in the lines formed by the loops themselves. This is made clearer by the patent drawings, which show a group of long, high floated loops thus alternating with a group of short, lower floated loops and separated by tying-in loops. The alternative construction, whereby an additional thread of different color might be introduced, need not be here considered. The claim in suit, however, does not answer to the group invention as described in the specifications. It is confined to "short and long loops; the long loops of one plush-thread lying over the short loops of the other plush-thread," etc. In view of the patentee's admission that his fabric differed from those of the prior art in a "surface which consists of alternating groups," etc., and of the references cited by the Patent Office, as shown by the file wrapper, and of the holding of the examiner that fabrics having alternating long and short loops were common in the art, it is doubtful whether any novelty could be claimed for the patented construction, except when combined in groups. But even if the claim as allowed be sustained for the precise construction shown, and even if, in violation of the language of the specification and of the constructions shown in the drawings, it be extended to embrace a fabric wherein there are no groups, and if, as claimed by complainant, the single long loop in one row of the fabric is to be understood as lying over or above the short loop in another row, we are unable to see how infringement by defendants could be predicated thereon.

In complainant's patent, the loops of plush-threads where shown in the drawings as floated over eight chains of body stitches before engaging the body-threads, are called "long loops;" where thus floated over four chains of stitches they are called "short loops;" while the tying-in loops are shown as not floated at all, and are described as "tightly interlaced with the body fabric." The patentee, in his testimony, defines these tying-in loops as "the small stitch * * * being the part of the plush-thread which is attached to the body-thread."

Complainant's witness, Wood, testifies as follows:

"X-Q. 79. In complainant's patent, as you look at it, the novelty is the arrangement of the long and short floated plush thread loops, and the short floated plush thread loops are just as material and important in the construction as the long loops, are they not? A. They are. * * *

"X-Q. 117. The tying-in loops, E, of Fig. 5 of the drawings of the patent show loops that lie down the fabric instead of up the fabric, do they not? A. We don't call that a loop. The yarn has to go around the needle to be tied in, and that is the place where it goes around the needle.

"X-Q. 118. The patent says 'short loops, E.' Where do these appear in the drawings of the patent? A. This E in Fig. 5 that you speak of, in the patent it is called a loop, but it has no bearing on the face; it simply shows where it goes around the needle and is tied in the body thread. It would show more on the back of the body thread than it would on the face.

"X-Q. 119. Then, as you understand it, 'short loops E' tightly interlace with

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the body fabric and between each of the long or short loops in the specification refers to loops, 'E,' there being no 'E' to be found on the drawings. Is that right? A. That is the way I understand it. * * *

"X-Q. 168. If the long loops lop over and lie on top of the short loops, as you have stated, the short loops serve to act as a padding to give greater elevation to the long loops, do they not? A. Yes.

"X-Q. 169. The loops that are tightly interlaced with the body fabric do not serve that end to much purpose, do they? A. They do not."

Defendants' fabric is composed solely of loops which correspond to complainant's short loops and tying-in loops. Or, if the short loops be considered as the equivalent of complainant's long elevated loops, then there are no short loops whatever, in the sense of the patent, because none of the remaining loops are "raised above the body fabric" or floated on any chains of stitches. They are merely "tightly interlaced with the body of the fabric."

In order to support his contention complainant is forced to differentiate two such tying-in loops lying side by side and identical in size, construction, and location, and to call one a short loop and the other a tying-in loop, and to further designate what corresponds to complainant's short loop as a long loop. Inasmuch, therefore, as defendants have neither the groups of short and long loops of the specifications, or the short and long loops of the claim in suit, it must be held that there is no infringement.

The decree is reversed, with costs, and the cause is remanded to the court below, with instructions to dismiss the bill.

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(149 Fed. 208.)

## SMYTH MFG. CO. v. SHERIDAN et al.

(Circuit Court of Appeals, Second Circuit. November 7, 1906. On Rehearing, November 21, 1906.)

No. 145.

1. PATENTS—INVENTION—ADJUSTABILITY OF PARTS.

Merely making the parts of a machine adjustable with respect to each other does not constitute invention, but is within the ordinary ingenuity of a skilled mechanic.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 17.]

2. SAME—NOVELTY—BOOK-SEWING MACHINE.

The Reynolds & Jacobs patent, No. 435,613, for a book-sewing machine for sewing the signatures of books together, claims 3 and 15, which are broad claims, covering a combination of detail parts not specifically described, except that they are adjustable, and the sewing devices generally arranged in groups, if given the broad construction imported by their terms, are void for lack of patentable novelty, in view of the prior art; the only novel feature being such adjustability.

3. SAME—SUIT FOR INFRINGEMENT—APPEAL.

Patents set up in the answer in a suit for infringement as a part of the prior art, printed and indexed in the record on appeal, and referred to in the briefs, and in relation to which witnesses were examined, all without objection, will not be excluded from consideration by the Appellate Court because they were not formally marked as exhibits by the examiner.

Appeal from the Circuit Court of the United States for the Southern District of New York.

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This cause comes here upon appeal from a decree of the Circuit Court, Southern District of New York, holding defendants guilty of infringement of claims 3 and 15 of United States letters patent No. 435,613, dated September 2, 1890, to Reynolds and Jacobs for book-sewing machines, and ordering injunction and accounting. The decision of the Circuit Court is found in 144 Fed. 423, and the following excerpt therefrom exhaustively and clearly describes the machine of the patent. "This patent relates to a book-sewing machine by which the separate signatures of which the book is formed are stitched together prior to binding. In the machine in question each signature is placed astride a swinging sheet-holder or bar, the upper edge of which enters the fold of the signature. The sheet-holder is swung forward and down into such a position as will enable the operator to place a signature upon it. The holder is then swung up, bringing the signature into proper position to be operated upon by the sewing devices. These sewing devices are arranged in groups, and the instrumentalities of each group cooperate to form a line of stitches. These lines of stitches are independent of each other. When each group of these sewing devices has formed a stitch in a signature, and secured it to the preceding signature, the sewn signature is pushed back, and another brought into position. The sewing is done by a series of semicircular needles, which pass through perforations in the back of the signatures, which are made by perforators mounted on the sheet-holder bar. The perforators move in guideways in blocks on the bar, and are lifted and retracted when necessary for the performance of the work by suitable mechanism. Loopers are carried by a bar, and employed to take the loops of thread from the needles. These loopers at each operation cast off the loops previously taken from the needles, and take other loops in a manner unnecessary to describe, but which is well known in the art for making the chain stitch. The shafts of the circular needles are mounted in needle blocks adjustable along a stationary bar, the face of which is provided with a row of cavities engaged by screws. Each needle block is provided with a screw, and each block may thereby be adjusted and held in any desired position. The blocks in which the perforators are guided, as well as the perforators, are adjustable along the sheet-holder bar, and may be moved into positions which correspond with the positions given the needles, and these blocks are held in position by screws. The loopers are adjustable on a transverse bar, and the blocks guide not only the perforators but the curved needles. The blocks guide other needles not used in the formation of the independent line of chain stitches, which secure the signatures to each other. These last-mentioned needles are used to introduce tapes across the backs of the books, to give them strength, and assist in securing them to the covers. These needles are many times omitted. The thread is supplied by spools. One spool [for each independent line of stitches] supplies the thread of which the chain stitches are formed, and another spool supplies the thread by which the tapes are secured to the backs of the books. The tapes are supplied from tape reels. The spools are mounted on a spool-holder adjustable transversely of the machine, and this spool-holder is provided with a screw or stud, which passes through a slot in a bar upon which the spool-holder rests. The spool-holder is locked into position by means of a nut. The reels supporting the tapes are mounted on bars in such a manner that they can slide transversely of the machine. When the position of the sewing devices, which consist of the needles, the perforator guiding blocks, the loopers, and the perforators, is shifted, the thread-supplying devices may also be shifted to correspond therewith. This is true of the tape-supplying devices when used."

Paul Synnestevedt and E. R. Newell, for appellants.

J. Q. Rice, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts). The machine of the patent is a complicated one, comprising many parts, and exhibiting various combinations. The patentee sought to cover whatever fea-

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tures they conceived to be novel by 16 separate claims, some of whic deal with quite minute details of operative parts. Two claims onl (3 and 15) are relied upon, and we are therefore concerned only wit the particular combinations which they refer to. Whether inventic may or may not lie in the combinations set forth in other claims nee not be discussed; it is not charged that any of those other claims a infringed. The specification is especially illuminative as to the mai feature of the patent, and as to what the patentee understood to be i distinctive novelty:

"Machines have heretofore been made for sewing books in which the fold sheet or signature is laid upon an arm or bar and presented to the sewi mechanism; but such sheets vary in size according to the size of the book be produced, and, in addition to this, different characters of books of t same size require different kinds of sewing, and difficulty has heretofore be experienced in introducing the sewing at the desired point in the back of t book. One of the principal features of the present invention relates to grou ing the sewing devices and mounting the same upon adjustable supports, that they can be placed at any desired point along the back of the signatu and the groups of sewing devices can be associated at any distances apart, that the sewing may be more or less closely together, according to the cha acter of book that is being sewed, and these sewing devices can be placed the proper distance from the top and bottom of the signature. In carrying o our invention we group together a semicircular needle and the devices f supporting and moving the same, a loop-tightening mechanism, and presse plate, which come above the signature and sheet-holding mechanism, and group together the perforator and the hook-pointed needles that act with the fold of the signature, the perforators forming the holes through which t circular needle passes, and the hook-pointed needles drawing down the loo of thread through which the circular needle passes, and these groups of i strumentalities are so supported that they can be moved or adjusted to a desired points, and the one is easily brought into the proper position to t other, and the actuating devices for the respective groups of instrumentaliti do not have to be changed. Hence the machine can be adjusted by the par using the same so as to bring the sewing to whatever place or places may desired upon the folded signature, and we group together the spools and tensi devices, so that they can be brought into proper position in relation to t groups of sewing devices as required from time to time."

The specification then proceeds elaborately to set forth, in 13 co umns, all the details of the "present invention."

From the above excerpt it is manifest that the principal feature, one of the principal features, is the making of the parts which do t sewing adjustable, so that upon a single machine books of varyi length may be sewed. It is this feature which is characteristic of t two claims declared upon, which read as follows:

"(3) The combination, in a book-sewing machine, of the sheet-holder bar a two or more groups of sewing devices adjustable transversely of the machi one part of each group of sewing devices being upon the sheet-holder bar a adjustable thereon, and the other portion of the group being above the she holder bar, which holds the signature that is being sewed, and also adjus ble upon a stationary transverse bar on the machine, substantially as s forth."

"(15) The combination, in a sewing machine, of sewing mechanism adjus ble transversely of the machine, a spool-holder adjustable transversely the machine, and a reel frame and reel for a tape or cord, also adjustab transversely of the machine, whereby the instrumentalities for perfecting t book-sewing can be thrown in the proper positions in relation to the sign tures to be sewed, substantially as set forth."

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erring to claim 3, the complainant's expert says:

elements of this claim are expressed in terms which do not, and evi-
were not intended to, confine the claim to the particular construction
and described. It is evident, for instance, that the terms of the claim
refer to the particular form of sewing devices illustrated in the patent,
they refer to the particular agroupment of the sewing devices shown in
wings and specifically described in the specification."

conclusion of the expert is manifestly correct, and the fifteenth
is as broad, if not broader, undertaking to cover any "sewing
nism," any "spool-holder," and any "reel frame and reel," which
justable, so that they can be thrown into the proper positions in
n to the signatures to be sewed.

specific construction of the group elements in defendants'
ne concededly differs from that of the patent, and the charge of
gement cannot be sustained unless these two claims, broadly
d as they are, can be held valid. The specifications, the lan-
of the claims, the concurring testimony of the experts, the
ions of counsel's brief, all unite in showing that the distinguish-
ature of the patented machine is its adjustability. By it, as
l asserts:

ractical way was devised of constructing a book-sewing machine so that
ition of the lines of stitches could be varied according to the character
books to be sewn, thus enabling the placing of the independent lines of
across the backs of the books where they would be most effective and
e the greatest holding power."

arently the prior art showed some adjustable needles (Hall's
, 105,329), but only in a machine which did not make inde-
nt rows of stitches. But the citation of the Hall patent is un-
ant. Mere adjustability of parts does not constitute invention.
v. Hanson, 129 U. S. 541, 9 Sup. Ct. 393, 32 L. Ed. 742; Doig
rgan, 122 Fed. 460, 59 C. C. A. 616; Sipp Electric & Machine
Atwood-Morrison Co., 73 C. C. A. 367, 142 Fed. 149. If we had
articular combination of complainant's groups of sewing de-
spool-holders, and reels with "one part of each group of sewing
s," as its expert says, "arranged on a particular part of the
ne, to wit, the sheet-holder bar, * * * and another part of
roup upon another part of the machine, to wit, the stationary
erse bar," but all rigidly affixed to their respective mountings,
ld require no more than the ordinary ingenuity of the skilled
nic to cut slots and arrange washers, set screws, etc., so as to
o each part of each group capacity for lateral adjustment.

order to escape this result, two other features are referred to as
validity to the combination of the third and fifteenth claims.
ointed out that the separate groups of sewing devices are so ar-
d as to enable each group to form an independent line of stitches
the back. We concur with the finding of the Circuit Court that:

ks sewn in this manner are very strong—much stronger than when
n the ordinary manner. When so sewn, if one line of stitches breaks,
ding of the signatures by the other lines is not disturbed, and the book
ot fall to pieces. When signatures are held together by a thread or
s common to all the lines of stitches [as was Hall's device, cited supra],
eaking of the thread in one line will permit one and perhaps more of

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the signatures to fall from the book, and as a result the book will soon com apart. The securing of the signatures by independent lines of stitches is es sential to the highest success in the sewing of books by machinery."

But independent lines of stitches were not new. In the patent t Smyth, No. 250,991, there are four semicircular needles, which ac in pairs. Each pair so operates threads supplied from two spools as t make a line of stitching across the back, and the line of stitchin so made by one pair is wholly independent of the line made by th other pair, whose supply of thread comes from two wholly independen spools. There are unsatisfactory features about the stitching of eac individual line the needles entering alternate sheets only, and the loop at the back being held in place by a cord passing through and lockin them; but entire independence between the stitches made by eac separate pair of needles is manifest, the breaking of any thread sewe in by the one pair having no effect upon the sewing done by the oth pair with independent threads. Whatever invention there may be the combination of detail parts which produces a better locked ar better secured individual line of stitches is not imported into eith of these claims; their only assertion of improvement being adjust bility, and the general arrangement of the sewing devices in group one part of each group being upon the sheet-holder and the other pa above the sheet-holder. Such a general arrangement is shown Reynolds, No. 366,793, or, to speak more accurately, is suggested that patent, since it shows only the perforators on the sheet-hold bar, but these are to co-operate with the needles located above th bar. Much is sought to be made of the "perforators arranged groups," so as to punch the holes from within, thus leaving the pap along the crease line inside of the signature smooth and in good co dition to receive the needles, while they also automatically center t signature, so that the openings for the needles are formed exactly the crease line. But such a location of the perforators is shown Reynolds (No. 366,793), only without any capacity for transverse a justment.

If these two claims are to be given the construction which the phraseology necessarily imports and which complainant contends fo they cannot be held valid in view of the prior art, because their on novel feature is adjustability. Whether the patentees did or did n invent a novel and useful device, for which, within the limits of the invention, they are entitled to patent protection, we do not unde take to decide. We are concerned only with the two claims he counted on. What has taken place since the entry of the decree in t Circuit Court, however, is somewhat suggestive as to the scope of t patent. It is stated that the defendants, in the face of the injuncti now under review, have so altered their machines as to deprive them their "adjustability," leaving the action in sewing and the form stitch made and the mechanism itself otherwise exactly the same; b apparently no step has been taken to extend the injunction to the nonadjustable machines. These facts do not appear in the recor but they are asserted in the appellants' brief, and not disputed in t appellee's. If the statements are correct, it would seem that d fendant's machine is not covered by any other of the 16 claims; b

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that circumstance is immaterial here. The claims now in controversy, if construed broadly enough to cover defendant's machine, must be held invalid for lack of patentable novelty.

The decree is reversed, with costs, and cause remanded, with instructions to decree in accordance with this opinion.

On Rehearing.

PER CURIAM. This petition may be divided into three parts. The first, which deals with the question of adjustability, is substantially but a restatement of the argument presented on the hearing of the appeal. The second is devoted to a dissertation in support of the proposition that it would require inventive genius to transform the machine of patent 250,991 into the machine of the patent in suit. This court did not hold the converse of that proposition, as is apparent from a reading of the opinion. Finally, it is suggested that prior art patent No. 250,991 was "not offered in evidence." It is set up in the answer, and is printed and indexed in the record. It is referred to in large type in appellants' brief, which appellee's counsel admit was before them when they prepared their own (see page 5 thereof); it was twice referred to on the oral argument, and one member of the court asked a question about it, but no objection to its consideration was presented. Moreover, the very counsel who signs this petition for rehearing, on cross-examination of a witness (record, page 394) said: "X-Q. 137. I call your attention to patent No. 250,991, * * * and ask you whether this patent does not represent the construction of the six machines," etc.? and followed this question with four others, referring to the same patent. In view of these circumstances, the objection made at this late day, that the examiner did not formally mark it in evidence as an exhibit, is not one calculated to commend itself to an appellate court.

A similar objection is raised to prior patent 366,793, also referred to in the opinion. Except for the questions on cross-examination, the facts with regard to this are the same. It is printed in the record, and, as the court's annotations show, counsel on both sides read from it and discussed it, with no suggestion from any one that it was not properly there.

The petition is denied.

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(149 Fed. 213.)

HOE et al. v. MIEHLE PRINTING PRESS & MFG. CO.

(Circuit Court of Appeals, Second Circuit. November 7, 1906.)

No. 35.

PATENTS—INFRINGEMENT—PRINTING PRESSES.

The Read patent, No. 688,690, for improvements in bed motions for cylinder printing presses, is not for a pioneer invention, and as limited by the prior art *held* not infringed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 141 Fed. 112.

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This cause comes here upon appeal from a decree of the Circuit Court, South ern District of New York, dismissing a bill for infringement of United State letters patent No. 688,690, December 10, 1901, to complainants as assignees o George F. Read. The patent is for "certain new and useful improvements i bed-motion for cylinder printing-machines." The specification states that th "present improvements relate to that class of bed-motions more especiall adapted for use in connection with bed-and-cylinder printing-machines i which the bed is driven throughout the major portion of its reciprocation b its bed-driving wheel gearing with one or the other of two driving-racks wit which the bed is provided and in which the reversal of said bed at each en of its stroke is accomplished, preferably, by means of a crank connection tha is caused to travel in a right line and to gradually slow down and stop th movement of the bed in one direction and to start and accelerate the same i the opposite direction." The particular mechanism which regulates the re versal of bed motion is not involved here and the invention consists, as th patentee says, "more particularly in a means for accomplishing the coupl between the bed-driving wheel and bed-driving racks by sliding the rim o the bed-wheel to and from said racks, which are for the purpose set in differ ent planes with respect to the driving-wheel." The cause is reported below i 141 Fed. 112.

J. Q. Rice and M. B. Phillipp, for appellants.
J. W. Munday and A. E. Dowell, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts). The Circui Court held that the patent was valid, but found that the defendant' device did not infringe the claims which were relied upon by the com plainant. In Judge Holt's reasoning and conclusions we fully concu and therefore do not feel it necessary to enter into any extended dis cussion of the case.

The complainant's counsel contends that inasmuch as defendan company has appropriated, as he insists, the several features of Read' invention it should not be held to avoid infringement, merely becaus it has added a new feature which may constitute an improvement o the combination of the patent; and he cites Cantrell v. Wallick, 11 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017, American Delinter Co. v Am. Machinery Co., 128 Fed. 709, 63 C. C. A. 307, and similar cases But it is not necessary to inquire whether defendant has taken the Rea structure to improve or has gone for its starting point to the earlie art; nor whether, as it contends, its improvement was the essentia addition which made the Read combination commercially practicable Infringement is to be determined by a consideration of the claims, an if their language is such that, upon a fair construction of them, de fendant's structure does not fall within their terms, infringement can not be found. For a full description of the invention reference ma be had to the opinion of the Circuit Court.

Suffice it to say here that in the prior art the driving wheel had bee shifted from one rack to another by devices which moved not only th wheel itself, but also the shaft on which it rotated. Also in the prio art the wheel had been so arranged that it could be itself shifted on th shaft. To correct defects alleged to exist in these methods of opera tion, Read made his wheel in two parts of which an enlargement o the shaft or axle was one and a so-called "cogged rim" was the other the enlarged part (central or body portion) being fixedly secured t

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aft, and the rim part having a movement on the other part at angles to the plane of rotation. As shown in the drawings and bed in the specification the rim rests upon the central body por- being "splined onto the body or crank, 0, so as to rotate there- It is supported solely by the body portion. As the applicant to the Patent Office when prior art was cited, "The broad body e driving wheel is made the steadying carrier for the narrow ed rim which moves upon it." Its ultimate support is the revolv- aft itself. In defendant's structure the rim is not mounted upon ody portion or in any way directly or indirectly upon the shaft. ed circular projection from the frame of the machine constitutes le support on which it revolves and moves facewise; a support y independent of the shaft or any of its appurtenances. The rim olved upon its individual support by a finger extending upward the crank or shaft. Whether this is or is not an improvement, it ifferent structure from a machine which mounts the rim not on an ly independent support, but on the shaft enlargement, or body n. That the patentee was himself impressed with the importance unting his rim on the enlarged shaft is apparent from the circum- es that in all the claims which are relied upon (1, 4, 5, 6, 11, and e has included that feature. Thus claim 1 covers a wheel having and a body, "the rim being adapted to move longitudinally * on said body." Claim 4 describes the gear as made in ring and "slidingly mounted upon the enlargement of said shaft." 5 covers a sliding ring gear and an enlargement or hub on the haft, "on which enlargement the gear is splined." Claim 6 reads:

*** * a sliding ring-gear, an enlargement or hub on the gear shaft upon enlargement said gear is mounted and to which it is splined."**

claim 11 we find:

**annular or ring pinion slidably mounted on but rotating with said disk, * * * and means for shifting the pinion upon the disk."**

claim 15:

**rotatable longitudinal immovable shaft having a large hub on one end, mounted on the said hub and sliding," etc.**

e Circuit Court remarked that "the ordinary meaning of one being mounted upon another is that it is directly supported by ther," and that the patentee had no intention to "cover a rim ted on and supported by a sleeve covering the body of the wheel." not necessary to construe the claims so closely as to confine them im directly supported by the enlarged shaft or body portion. It vell be that they are fairly entitled to a construction which would a rim indirectly mounted upon the shaft. In ordinary speech a s said to be mounted upon a horse, although there may be a saddle en himself and the animal's back, and, if the circular support, which the defendant's ring gear is mounted were itself supported e shaft, we are not prepared to hold that infringement would not de out. But such is not the fact. The circular support on which ng gear is mounted, revolves and slides is not itself mounted upon pported by the hub or shaft, but is a wholly independent pro-

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jection from the frame of the machine. The claims cited could b made to cover such a structure only, if at all, by the extremely liber construction which has sometimes been accorded to highly meritor ous pioneer patents.

Concurring as we do in the conclusion of the Circuit Court th Read's is not a pioneer patent, we cannot expand its claims sufficient to cover defendant's structure.

The decree of the Circuit Court is affirmed, with costs.

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(149 Fed. 216.)

## SWIFT v. PORTLAND BRUSH & BROOM CO. et al.

(Circuit Court of Appeals, Seventh Circuit. October 29, 1906.)

No. 1,289.

PATENTS—INFRINGEMENT—CELL-CASE MACHINE.

The Swift patent, No. 622,403, for a cell-case machine for the man facture of cell cases or fillers for crates used in the transportation eggs or fruit. Claim 1 is void for lack of novelty and invention in vie of the prior art. Claim 19, conceding its validity, *held* not infringed.

Appeal from the Circuit Court of the United States for the Di trict of Indiana.

The appellant was the complainant below, in a bill for infringement letters patent No. 622,403 issued to him, April 4, 1899, for "cell-case machine As stated in the patent, the "invention relates to the manufacture of ce cases or 'fillers' for crates used in the transportation of fruit, eggs, etc one of its objects being to provide simple and efficient mechanism automatically produce from flat paper webs a continuous fabric comprisi rectangular cells." Twenty-five claims are contained in the patent, and u on motion for specification of the claims relied upon, 18 were so specifi by the complainant. On this appeal, however (as in the hearing below), t charge of infringement is narrowed to two claims, numbered 1 and 19, whi read as follows:

"(1) In a cell-case machine, the combination with feeding mechanism for paper web, of perforating mechanism having means to produce a transver series of unalined or divergent slots in said web, the corresponding slots each series being longitudinally disposed in said web, mechanism to divi said web longitudinally in strips, mechanism to twist said strips at rig angles to the plane of said web, and mechanism to converge said strips wi said perforations in straight transverse alinement, substantially as set forth

"(19) In a cell-case machine, the combination with feeding mechanism f the cell-case strips, of mechanism to notch or perforate said strips, a fix conduit for said strips, and an oscillatory former adapted to bend the edg of the notches in said strips against the wall of said fixed conduit, su stantially as set forth."

The facts bearing upon the issues, including the references, in far as deemed material, are stated in the opinion.

Border Bowman, for appellant.

V. H. Lockwood, for appellees.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts). The machin described in the patent (No. 622,403) is a complicated and usef combination of means to make egg cases or fillers of straw board t

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used in crating eggs. The face of the patent, with the array of aims allowed, gives the impression of invention of great merit; and e story of its capability in manufacturing the cases out of webs of raw board, is even more impressive. This view of the invention, owever, is completely dispelled upon the introduction of numerous tent devices, which not only anticipate the mechanism and function the patent means in all save minor details, but the want of novelty respect of all claims upon which infringement was charged, expt 1 and 19, is not disputed upon this appeal. So, it is neither necsary nor desirable to discuss the general mechanism, claims, or prior t, beyond such reference as may bear upon the narrow issues thus maining. Nor is it needful to discuss the contention on behalf the appellant that the appellees cannot be heard in denial of the lidity of any of the claims, by reason of prior contract relations tween the former and predecessors of the latter, as it is plain that e proof raises no such question, were it otherwise material.

1. The essential element of claim 1 is the means for perforating the per web when fed into the machine, described in the claim as "means produce a transverse series of unalined or divergent slots in said eb, the corresponding slots of each series being longitudinally dissed in said web." The object of the perforations was for interlockg or engagement of the strips to form the cell, and it is conceded at means and function were old, except in the special feature of alinent. It is contended by the appellant, that "claim 1 by providing for e slots out of alinement and converging the longitudinal strips, so at the cell would be greater in height than in width, did not interfere ith the proper interengagement of the cells." The divergence, as dicated in the drawing, is hardly appreciable to the observer—upon easurement is shown not to exceed two-sixteenths of an inch divernce from a straight line in the total length of the series, 15½ inches and neither meaning nor function is apparent in claim or specification ithout careful study. Upon the argument, the utility of this provion is pointed out in reference to the particular form of slot made by e patent means, but the divergence is without value or function in e appellees' different form of slot; and it is obvious that the seeming ct of like divergence in the latter was an inadvertence. We are satised, however, that the provision upon which this claim rests is without velty, under the disclosure of like divergence in the drawings of ates' patent, No. 570,621; and that, in any view, invention is not volved in the obvious expedient to adapt the means to the slots of e patent device.

2. The elements of claim 19 are feeding and perforating means, the ed conduit for the strips, and the so-called "oscillatory former," furer described as "adapted to bend the edges of the notches in said rips against the wall" of the conduit; and the only feature for which velty is contended is this "former."

The question of infringement hinges, as stated in the appellant's ief, on the construction of this claim—in fact, upon interpretation of e last mentioned element as referred to in the claim and specifications. this element is limited to the terms of the claim, as "an oscillatory

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former adapted to bend the edges" etc., it is conceded that the appell does not infringe. While the forming or bending means thus provide in the patent structure is needful to bend the special form of notch ar slot adopted for the strips of strawboard, so that the mouth of tl slot in the upper strip is widened to receive and interlock with tl slot of the other (longitudinal) strip, the appellees' machine cuts o and removes these edges in both strips, making V-shaped openings- bending is not required, and the patent means referred to is not pre ent in the machine. The contention is, however, that another fun tion is provided in this means of the patent, namely, in means referre to in the argument as a "flipper bar," to "insure the proper feeding the strip by bending the web against the wall of the fixed conduit and that the appellee employs like means for like function. Assun ing, however, that such identity appears, the interpretation which thus sought for this claim is strained and unauthorized. It ignor both name and description of the means and the function attributed it; and as well the only feature which is pointed out for this eleme in the specifications. Thus various references in the specifications a unmistakable in their meaning:

(1) "The web from which the transverse strips are to be formed is pass between feed rollers to suitable mechanism and perforated with a series slots arranged transversely with respect to said web in a straight line. T edges of said slots are then bent to facilitate engagement thereof with tl notches in the longitudinal strips, with the notches of which said transver web is in registry. A strip of width equal to the longitudinal strips wi which said web is engaged is then cut transversely from said web and pass thence as a portion of the cell-case fabric.

(2) "Owing to the peculiar interlocking form of my improved filler-strip it is necessary for their proper engagement that they should be prepare by opening the respective notches which are to be engaged before said engag ment is effected. This preparatory bending of the notched edges is be shown in Fig. 23 and is effected as follows:

(3) "The edges, $y^2$, of the notches, $y^3$, in respective strips, Y′, of the latt are bent, as shown in said Fig. 23, by means of the frame, P, which mounted for oscillation upon its upper shaft member, P′, in the bearings, upon the frame member, $A^6$. The lower bar, Px, of said frame is provide with forming plates, $p^x$, adapted to bend the edges, $y^2$ of said notches, y over the corners, $p^2$, of the rear wall, g′ of the conduit, G, and thus ope said notches, $y^3$, for engagement with the notched strips, X′. See Fig. 23

We are of opinion that the evidence fails to establish infringeme of claim 19, under any reasonable construction of its import; and th issue upon its validity in view of the prior disclosures does not requi consideration.

The decree of the Circuit Court accordingly is affirmed.

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'ed. 219.)

BALL BEARING CO. v. STAR BALL RETAINER CO.

(Circuit Court of Appeals, Third Circuit. December 6, 1906.)

No. 26.

TS—INFRINGEMENT—BALL BEARINGS.

The Simonds patents, Nos. 449,968 and 449,959, for ball bearings, narwly construed, as required by the prior art, *held* not infringed.

eal from the Circuit Court of the United States for the Eastern ct of Pennsylvania.

opinion below, see 147 Fed. 721.

B. Stoughton, for appellant.

en C. Dowell, for appellee.

ore DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

LLAS, Circuit Judge. This is an appeal from a decree disg a bill in equity, in which the appellant charged the appellee infringement of two patents belonging to the appellant, viz., s No. 449,968 and No. 449,959, both dated April 7, 1891, and to George F. Simonds, for "Improvements in ball-bearings."

claims of patent No. 449,968 are as follows:

An annular ball-retaining cage consisting of a tubular body having a opening to receive a central support and provided with flanges lateral openings that surround the central opening, in combination pherical rollers or balls that are held in said cage and project through teral openings to resist end pressure or thrust, said balls being ar- to revolve freely in all directions and removals in a body with the ubstantially as described.

An annular ball-retaining cage consisting of a central tubular body end flanges provided with lateral openings, in combination with al rollers or balls that are held between said flanges and project h the lateral openings to resist end pressure or thrust, substantially ribed.

In a ball-bearing, the combination, with a central support, of a re- le annular cage consisting of a tubular flanged body provided on e sides with lateral openings, and a series of spherical rollers or balls d in said cage in such a manner as to revolve freely in all directions ojecting therefrom in position to resist end pressure or thrust, said nd balls being removable in a body, substantially as described."

ent No. 449,959 contains two claims; but the first only is alleged e been infringed. It is as follows:

In a ball-bearing, the combination, with spherical rollers or balls, movable annular cage in which the balls are retained in a body and in they have free lateral play and are capable of revolving in all direc- said cage being independent of the bearing-surfaces, against which the ct and between which said cage is adapted to move, whereby the said re free to move in varying lines, so that all parts of the bearing- es will be subject to the rolling contact of said balls and the wear iction distributed, substantially as described."

Circuit Court based its decree wholly upon its finding that the lant below had not infringed any of these claims, and as we con- that finding, the validity of the patents need not be questioned. ssume the validity of both of them; but that this may be reason-



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ably done, they must be narrowly construed, for the record befor us makes it plainly apparent that the prior state of the art require the limitation of each of them to the precise devices mentioned in it claims. Boyd v. Janesville Hay-Tool Company, 158 U. S. 260, 15 Sup Ct. 837, 39 L. Ed. 973.

The claims of patent No. 449,968 all specify a tubular body havin flanges with lateral openings, through which the balls project to resis end thrust. The construction alleged to infringe has no such flange and does not appear to be designed or adapted to resist end thrust, bu to oppose radial pressure. Claim 1 of patent No. 449,959 calls fo an annular cage in which the balls have "free lateral play" and ar "free to move in varying lines." This freedom to move is an essenti feature of the first claim of that patent, and it seems to us to be lack ing from the construction complained of.

Upon the grounds stated, we think it clear that the court below wa right in holding that the charge of infringement had not been sustaine as to either of the patents sued on; and the opinion of the learne judge of that court (147 Fed. 721) is so entirely satisfactory as to re der any further discussion of the case unnecessary.

The judgment is affirmed.

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(149 Fed. 220.)

## BATES MACH. CO. v. WM. A. FORCE & CO.

(Circuit Court of Appeals, Second Circuit. November 7, 1906.)

No. 163.

PATENTS—INFRINGEMENT—NUMBERING MACHINES.

**The Bates patent, No. 676,084, for an improvement in typographic nu bering machines, narrowly construed as required by the prior art, he not infringed.**

Appeal from the Circuit Court of the United States for the Soutl ern District of New York.

Defendant's appeal from interlocutory decree of the United Stat Circuit Court for the Southern District of New York sustaining tl validity of complainant's patent, No. 676,084, and granting an injun tion and accounting. The opinion of the court below is reported 145 Fed. 529.

Wm. E. Warland, for appellant.

Hubert Howson and Warren Wright, for appellee.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The patent in suit is for a minor improvement i a typographic numbering machine, and every element comprised in tl combinations of the claims in suit was old in the art, except the pr jecting arm on the plate with teeth engaging the gear teeth of tl plunger device of claim 2, or "the extending arm with rack teeth" c claim 22. Counsel for complainant says:

**"It is the projecting arm in the plate above, bridging and overhanging tl intervening wall, that constitutes the new element of claim 2 not found in tl prior art."**

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Complainant's plunger plate is "guided in its reciprocating movements by pins in holes or sockets." Defendant's plate is likewise guided by a pin extending vertically downwards and moving in a vertical slot in the stem of the plate. Such guiding pins are admittedly old. In defendant's machine another pin extends laterally from said vertical pin and engages with a notch in the arm of the pawl carrier. There are no gear teeth either on the pin or arm.

Defendant's device does not infringe the claims in suit, unless the laterally extending pin attached to said guiding pin and the notch in the pawl carrying arm are the equivalents of the two arms having gear teeth of the claims in suit. The court below found that the two forms of engagement were equivalents. We are of the opinion that in such a narrow patent, inasmuch as the patentee has specifically described, illustrated, and claimed, a construction calling for "gear teeth" meshing with other gear teeth, the doctrine of equivalents should not be extended to embrace defendant's pin and notch device.

Furthermore, the prior Rhinehart patent, No. 388,307, disclosed, in a typographic numbering machine, this identical combination of a pin extending laterally from the vertical support of a plate, guided in its up and down movement by a slot in the partition, and engaging with a notch in the pawl carrying arm. Therefore, if the pin and notch are equivalents of the gear teeth, there was no novelty in the substitution of the one for the other by the patentee. If they are not equivalents, there is no infringement. The defendant's so-called projecting arm is not one "bridging and overhanging the intervening wall" except as above shown.

But complainant argues as follows:

> "Bates has secured a new result, namely, that of permitting the vertical removal of the plunger, the aim and purpose of the invention."

This would seem to be immaterial because we are not satisfied that any practical advantage is derived from such capacity for vertical removal; because means for permitting vertical removal were shown in the Bartusch and Haney machines of the prior art; because it is not contended that defendant's locking and unlocking device is an infringement of the claims in suit; because said claims do not call for a removable plunger; and, further, because given the Rhinehart closed slot it would be obvious to any mechanic to open the upper end if a device was to be used where vertical removal of the plunger was desired.

It is true that a patentee is entitled to all the beneficial uses of his real invention whether stated or not. But the fact that this patentee, while enumerating in his specifications some 12 advantages resulting from his improved construction, has not even hinted at or suggested any resulting capacity for vertical removal of the plunger, is very persuasive that this element, instead of being "the aim and purpose of the invention" of the patentee is rather the discovery of his expert.

The decree is reversed, with costs.

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(149 Fed. 222.)

## UNITED STATES FASTENER CO. v. BRADLEY.

(Circuit Court of Appeals, Second Circuit. November 7, 1906.)

No. 214.

1. PATENTS—INFRINGEMENT—SEPARABLE BUTTON.

The Pringle patent, No. 580,000, claim 1, for a separable button cat designed for use with a stud member, to form a separable button fastener, was not anticipated, and discloses patentable invention. Al *held* infringed.

2. SAME—SUIT FOR INFRINGEMENT—EFFECT OF NONUSE OF PATENT.

Where a patented device is obviously operative and useful, the fa that it has never been manufactured by the owner of the patent does n affect his right to maintain a suit for infringement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 448.]

Appeal from the Circuit Court of the United States for the Southe District of New York.

On appeal from a decree of the Circuit Court for the Southern Di trict of New York, holding valid and infringed claim 1 of letters pate No. 580,000, granted April 6, 1897, to Eugene Pringle, for an improv ment in separable buttons. The opinion of the Circuit Court is r ported in 143 Fed. 523.

J. A. Carr, for appellant.

Donald Campbell and H. C. Messimer, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The facts are fully set out and the issu clearly stated in the opinion of the court below. These need not repeated.

We agree with the judge of the Circuit Court in his disposition the defenses of noninfringement, double patenting, inoperative chara ter of the device covered by the first claim, abandonment and res juc cata. That the latter defense was correctly disposed of is now co clusively established by the production in court of the original decr showing affirmatively that the former suit was not decided on t merits but was dismissed solely for lack of prosecution. The on question requiring further consideration is the question of patentabilit

The invention, so far as it is involved in the present controvers relates to improvements in the socket member of snap fasteners f gloves and other articles which are to be detachably fastened togethe Previous to the patent the art had developed largely, though not e clusively, in the direction of improvements in the stud member, whi was made with a resilient globulous head, which was forced into nonyielding socket contracting and expanding each time it was press in or pulled out. The present invention reverses these condition the stud being solid and unyielding and the socket member being elasti The description and drawings illustrate a two piece studholder consis ing of an elastic slitted stud-catching part and a holder therefor attached that the central elastic stud-holding piece is held firmly

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position but with sufficient room in which to expand when the stud is forced against its inner surface.

The first claim was suggested by the examiners of the patent office after the subject-matter of the invention had been thoroughly discussed and carefully examined by them. The claim is as follows:

"(1) A separable button-catch comprising an apertured washer and an eyelet having a shank of less diameter than the aperture of the washer, and having two enlargements securing it in the aperture of the washer and slitted lengthwise through the shank and the enlargements as and for the purpose set forth."

The device of the claim when completed is so diminutive in size and simple in construction that, unless care be taken, the assertion that there is no room for invention in so small a structure may receive greater consideration than is warranted. This court has repeatedly upheld patents for similar improvements, the test being not the simplicity of the device, but the difficulties overcome and the result accomplished.

In Fastener Co. v. Littauer, 84 Fed. 164, 28 C. C. A. 133, a patent for similar improvements in the stud member of a snap fastener was, after full consideration, declared valid. See, also, Kent v. Simons (C. C.) 39 Fed. 606; Fastener Co. v. Hays, 100 Fed. 984, 41 C. C. A. 142; Consolidated Co. v. Fastener Co. (C. C.) 79 Fed. 795.

The improvement now under consideration, notwithstanding its simplicity, shows a marked improvement over the elastic sockets of the prior art. It is simple, inexpensive, strong and durable; it does not tear or injure the material to which it is attached or lose its elasticity by use. The washer not being slitted, but firm and rigid, prevents the undue expansion and consequent weakening of the elastic stud-catcher, which is at all times held in proper position for engaging with the stud. A device having these valuable characteristics is not found in the prior art.

The defendant's expert was asked on direct examination to name the patents which, prior to September 8, 1888, the date of Pringle's application, "showed a socket-member of a fastener comprising a slitted eyelet mounted in an apertured washer." In answer he named patent No. 181,979, granted to C. M. Platt in 1876, and patent No. 374,609, granted to C. W. Mandrill in 1887. He also mentioned two patents to W. S. Richardson, but these need not be discussed as they are apparently not relied upon in the defendant's brief and were hardly alluded to at the argument. Unquestionably the Platt and Mandrill patents are defendant's best references.

Platt shows an eyelet having a slot cut into it breaking its continuity and permitting expansion and contraction. The eyelet is secured to the shoe or glove by punching a hole in the fabric, passing the shank of the eyelet through and upsetting the end of the shank to form a flange. The eyelet does not form a complete annulus because of the slot which is cut into it. One of the figures shows the socket made in two parts, both in the form of split eyelets, one slightly larger than the other. The latter is first affixed to the fabric when the former is inserted and clinched thereto thus giving additional flange surface and keeping the socket more firmly in position. "In all cases, however, the

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slot or opening 'g' must be made through both flanges and the sh of the eyelet." If this were otherwise the necessary resilience would lacking. In operation the socket is pressed over the stud when socket, or eyelet, by reason of the slot formed therein, will spring op permit the enlarged head to pass and contract again below the he The parts are disengaged by pulling the fabric to which the eyelet attached upward, then the eyelet will again spread and permit the he to pass through. "An eyelet with a slot formed therein" is one the elements of the claims.

We think it very plain that whether this member is constructed one eyelet or two its continuity must be broken by the slot which made through both flanges as well as the shank. If this were not the device would be inoperative for want of elasticity. Certainly t is a very different device from the one in suit where the apertu washer prevents the resilient stud catch from being overstrained a unnecessarily expanded or distorted. Pringle presents the glovemal with an accurate, symetrical, workable device, requiring no adju ment and needing only to be attached to the fabric without change adaptation. Platt hands him a split eyelet, or two split eyelets, and t him to clinch one or both to the fabric. Whether or not an operat fastener is produced depends largely upon the skill of the glovemak

The Mandrill patent is for an improved "glove fastener," in wh the stud-holder consists of "a split expansible socket-ring or annul the interior periphery of which is made smooth for the ready and f passage of the head on the post." This socket-ring is provided wit tubular boss, which also has a longitudinal slot, which aligns with slit in the ring, or annulus, thus imparting a yielding action to b the boss and socket-ring. The boss may be formed of a single pi of sheet metal with the socket-ring. When the stud is inserted a withdrawn the entire structure, ring, boss and fabric, must expand a contract, diminishing its resiliency, injuring the fabric and ultimat becoming detached therefrom. The Mandrill device is of the sa type shown in the Platt patent, and has all the latter's defects, w some new ones added.

We are clearly of the opinion that neither patent anticipates the vention of the claim in controversy.

We are also of the opinion that it requires an exercise of the ventive faculty to produce the device of the claim. The record sho many attempts to construct a successful elastic socket member and also shows as many failures. Pringle succeeded, by producing exceedingly simple combination of the apertured washer and slit eyelet as described and claimed. The invention, though one of mi importance, is entitled to protection.

It is asserted by the defendant that the complainant never ma fasteners under the Pringle patent. If this be true it is wholly i material to the present controversy. Where it is asserted that patented device is inoperative and lacks utility, evidence that it h never been put to use is persuasive, but in a case like the prese where the fact that the device is useful and operative can be seen a glance, such evidence is negligible. The complainant had a right to u the patent in any way it saw fit.

The decree is affirmed.

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Fed. 209.)

## WRIGHT v. VOCALION ORGAN CO.

(Circuit Court of Appeals, First Circuit. October 31, 1906.)

No. 644.

NTRACTS—VALIDITY—SALE OF FUTURE INVENTIONS.

The rule applied that a contract by an inventor, in consideration of his mployment for a term of years at a salary, to assign to his employer a alf interest in all inventions made by him during the term, is not conrary to public policy.

ECIFIC PERFORMANCE—POWERS OF COURT—MODIFICATION OF CONTRACT.

In decreeing the specific performace of a contract, a court of equity ay adapt it to conditions which were not foreseen by the parties when it as made, by requiring the complainant to assent to such modifications nd limitations as justice requires in view of such new conditions.[1]

NTRACTS—CONSTRUCTION—CONTRACT FOR INTEREST IN FUTURE INVENTIONS.

Complainant was a corporation engaged in the manufacture of musical nstruments, including organs, and defendant was its superintendent of actories and had made certain inventions relating to organs. A new conract was made between them by which, in consideration of an increased alary for a term of five years, it was provided, in clause 2, that a onealf interest in all improvements or inventions made by defendant durng the term "in or relative to organs, both keyed and automatic," should e assigned to complainant, and they should be patented at complainant's ost. By clause 4 it was provided that complainant should have the exlusive right to purchase and use improvements and inventions made by efendant during the term "in self-playing pianos or self-playing devices or playing pianos," on such terms as should be agreed upon. Defendant uring the term made and patented certain inventions which were aplicable alike to organs and to self-playing pianos. *Held*, that such invenions were within the contract, and complainant was entitled to an asignment of a half interest therein, or a perpetual license to use the same ithout further payment, but only in so far as they related to organs, as xpressed in the second clause of the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 859.]

peal from the Circuit Court of the United States for the District assachusetts.

r opinion below, see 137 Fed. 313.

njamin Phillips (Alfred H. Hildredth, on the brief), for apnt.

orge B. B. Lamb and George D. Beattys (Alexander P. Browne, e brief), for appellee.

fore COLT, PUTNAM, and LOWELL, Circuit Judges.

TNAM, Circuit Judge. This bill was brought in the Circuit t by the Vocalion Organ Company, a corporation organized under ws of the state of New Jersey, against Morris S. Wright, a citizen e state of Massachusetts. The decree was for the complainant, the respondent below appealed to us. It is somewhat difficult ake a concise statement of the facts; and therefore, for that pur-

ee note at end of case.

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pose, we adopt that given in various extracts from the opinion of th learned judge of the Circuit Court as follows:

"This suit in equity is brought to compel the defendant to assign to th complainant a one-half interest in certain improvements, inventions, an patents in or relative to organs, in accordance with the terms of a writte contract made by the parties on May 15, 1901. The suit is brought also restrain the defendant, his heirs, executors, administrators, or assigns, fro selling or assigning any interest in said inventions, improvements, and paten to any person other than the complainant during the life of the contract.

"At the time of entering into the contract the complainant was engaged in th business of manufacturing and selling musical instruments, including organ both keyed and automatic. The defendant was the superintendent of the co plainant corporation at a salary of $3,600 per year.

"Although only the second and fourth paragraphs of the contract a brought before the court for construction, it is material for certain purpos of the inquiry to examine the whole contract. The contract is as follow

"'Agreement made this fifteenth day of May, in the year nineteen hundre and one, between the Vocalion Organ Company, a corporation organized an existing under the laws of the state of New Jersey, transacting business Worcester, in the county of Worcester, commonwealth of Massachusetts, an in the city of New York, state of New York, party of the first part, and Mo ris S. Wright of Worcester, aforesaid, party of the second part, witnesseth

"'That for and in consideration of the mutual covenants and other conside ation hereinafter expressed the parties hereto covenant and agree as follow

"'First. The party of the first part covenants and agrees to employ th party of the second part and does hereby employ the party of the second par and the party of the second part covenants and agrees to accept and herel does accept exclusive employment of the party of the first part as superinten ent of factories of the party of the first part.

"'Second. The party of the second part covenants and agrees that an u divided one-half part of the whole right, title and interest in and to all i ventions or improvements made by him during the term of this agreement, or relative to organs, both keyed and automatic, shall be the property of th first part, and, immediately upon making any such inventions or improv ments, the party of the second part covenants to apply for letters patent the United States therefor, and for such foreign patents therefor as the par of the first part may desire, and to make, execute and deliver all such applic tions, specifications, drawings and other documents as may be necessary obtain such letters patent; and the party of the second part further covenan to execute, acknowledge and deliver to the party of the first part a prop assignment for record of an undivided one-half interest in each such inve tion and in the letters patent when issued—all, however, at the proper co and expense of the party of the first part or its successors and assigns. Th party of the second part further covenants not to sell or assign his undivid one-half part in and to any of the above-mentioned inventions, improvemen and letters patent, which part shall be and remain the exclusive property the party of the second part, his heirs, executors and administrators, unt the expiration of the term of this agreement.

"'Third. The party of the second part further covenants and agrees that will without further consideration than is herein expressed assign and tran fer to the party of the first part letters patent of the United States numb 509,506 for improvements in reed and pipe organs and will upon request the party of the first part execute and deliver to the party of the first part proper assignment of said patent for record.

"'Fourth. The party of the second part further covenants and agrees grant and does hereby grant unto the party of the first part the exclusiv right to purchase and use inventions or improvements made by him durin the term of this agreement, in self-playing pianos or self-playing devices f playing pianos, upon such terms as to price or royalty and other conditions may be mutually agreed upon; and the party of the second part further cov nants that he will not sell, assign, transfer or in any way dispose of an

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invention or improvement to any other corporation or persons than the of the first part during the term of this agreement.

* * * * * * * * * * *

eventh. It is further covenanted and agreed that this agreement shall emed to be in full force and effect from and after the first day of July, een hundred, and until the first day of July, nineteen hundred and five, hall terminate on said first day of July, nineteen hundred and five.

n witness whereof,' " etc.

ie testimony tends to show that, previous to making the contract, Mr. aine, the president of the complainant company, had many conversations the defendant in regard to his experience and ability in manufacturing, ving, and inventing musical instruments; that the defendant gave the ance that he could develop and improve the different instruments manu- red by the complainant company; that, in view of these representations by the defendant, the complainant company was induced to make the ment now in suit, providing for the increase of the defendant's salary $3,600 per year to $5,000 per year, with an added percentage based on alue of the output; and that the arrangement under the contract was to iue from July 1, 1900, to July 1, 1905.

ie testimony tends to show that the defendant made improvements and tions during the term of the agreement, and applied for and obtained s patent. The complainant requested the defendant to assign to it an ided one-half interest in these improvements and letters patent, alleging they were improvements or inventions in or relative to organs both keyed iutomatic. The defendant refused to do this.

ie evidence tends to show that the defendant made certain inventions e musical art, for which application for letters patent was made and ed. The testimony also tends to show that all these alleged improve- s and inventions were applicable equally as well to organs as to piano- rs. The complainant contends that all these improvements and in- ons come under the terms of the second paragraph of the agreement, be- they are improvements and inventions 'in or relative to organs both l and automatic.' And the complainant insists that these inventions and ts should be transferred to it, notwithstanding the fact that they also to self-playing devices for playing pianos. The defendant insists that, r as these inventions relate to organs both keyed and automatic, and also lf-playing pianos or self-playing devices for playing pianos, they should cluded from the consideration of the contract; that the second paragraph d be held to embrace inventions which relate exclusively to organs both l and automatic; and that the fourth paragraph should be held to em- exclusively inventions in self-playing pianos or self-playing devices for ng pianos."

iter thus stating the case, the learned judge concluded as follows:

he patents put in evidence in the case do not seem to us to embody in- ons simply and only upon piano-players according to their terms and titles. They appear to relate as distinctly to organs as to pianos or piano- rs or devices for playing pianos. The interpretation sought by the de- int would eliminate all or nearly all the alleged inventions made by the idant, and leave no improvements or patents upon which the contract is erate. It seems to us this is an unreasonable interpretation of the con- , and an interpretation not warranted by the evidence in the case. We ve the interpretation which we have given in consonant with the terms ie whole contract, the evident intention of the parties and with their n in the premises.

nder this interpretation an undivided half part of all inventions or im- ements made by defendant during the term of the agreement, namely, July 1, 1900, to July 1, 1905, in or relative to organs, both keyed and natic, must be transferred to the complainant, even though those improve- s and inventions may also relate to other musical instruments. The de- int should also assign to complainant an undivided half part of all such itions or improvements, for which applications for letters patent have

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been made, as set forth in paragraph 4 of defendant's answer, except those which letters patent have been already issued. The defendant should also sign to complainant all inventions for which any other applications for lett patent have been made both in the United States and foreign countries d ing such term. He should also assign to complainant a half interest in letters patent named in the stipulation of the parties in the case, and all ot letters patent embodying such inventions or improvements. The defend should also apply for letters patent, both foreign and domestic, and sho execute assignments of his applications to the complainant."

The decree entered in accordance with this opinion was so phras as, to use its own language, to enjoin the respondent "from direc or indirectly interfering with, or preventing or hindering or annoyi the Vocalion Organ Company, complainant herein, or its successors assigns, in the manufacture or sale of any musical instrument or struments, or any part or parts thereof, containing or embodying whole or in part any one or more of the defendant's inventions improvements hereinbefore set forth, or any portion of the same; a also in the use of said inventions and improvements, or any of the in any way complainant may see fit." The fifth error assigned ma this phraseology the basis of an alleged distinct error. It was broad, in that it in effect protected the Vocalion Organ Company, only so far as its lawful rights were concerned, but to such an ext as to cover organs and pianos which might contain elements which Vocalion Organ Company had no lawful right to use, if only they c tained some of which it was the proprietor. Whatever difficulty ther in this part of the decree can be obviated on a reframing of it by Circuit Court in pursuance of the judgment which will be entered this case. Probably what is apparently objected to was a mere advertence which would not have occurred if the respondent below insisted on his right to have a draft decree in accordance with the ru of the Circuit Court, thus giving an opportunity for correcting mere matters of phraseology.

The other errors assigned are of so general a character that it difficult for us to apply them. With the rest, they relate to num ous patents the peculiarities of which have not been categoric explained; and, consequently, for us to attempt to investigate th would throw on us a burden which, on the whole, we do not fin necessary to assume, as we are of the opinion that the substan case comes down to a single proposition.

Nevertheless, we are, perhaps, justified in giving some attention incidental propositions which were argued before us. Any suggest that a contract of the character in question is ordinarily contrary public policy, and therefore cannot properly be enforced, is contrar the rules of law as now settled, as shown by us, in Reece Folding Ma Co. v. Fenwick, 140 Fed. 287,[2] 2 L. R. A. (N. S.) 1094. Vari propositions made by the appellant, and grouped under the m general one that the Circuit Court erred in ordering the respond alone to perform, are not only not to be regarded as within the te of assignments of errors of the general character we have before but, as applied to the proofs in this record, they are purely acaden The claim that the Vocalion Organ Company has not performed

[2] 72 C. C. A. 39.

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vn covenants contained in the contract in litigation, to which so much tention is given by the appellant, is, on this record, a mere question of e burden of proof, without the slightest indication that the topic was ought to the attention of the Circuit Court. Therefore it cannot erit any discussion here. One of the errors assigned relates to four ecific patents named therein, and alleges they were not put in evi-ence. There does not seem to have been any formal putting in evi-ence; but, as the Circuit Court regarded them as in evidence, and as no jection was there made on that point so far as the record shows, is point cannot be made here. Indeed, there can be no question that fair understanding of an agreement found in the record indicates that e parties regarded them as in the case. Some of the patents are re-rred to by the appellant with a claim that they do not make any ention of organs. It will appear further along in this opinion that is would be immaterial so long as they cover musical instruments, d it is plain on their face that they may be available for organs. lso, it is objected that one of the patents is merely for inclosing ses; but it is shown that these are peculiarly for use with automatic struments, so that it is entirely within the expression in the contract elative to organs."

This brings us to the only substantial question, and this the ap-llant introduces to our attention by the just assumption that there is undation for a finding that, at least, some of the inventions in ques-on are applicable as well to pianos as to organs. He claims that the ntract, so far as it is important for us, covered only inventions which lated exclusively to organs, and that it made no express provision for ose which related both to organs and pianos. It is to the latter class inventions, that is, those which are useful for both organs and pianos, at he contends that some, if not all, of those in controversy belong. s we have already observed, the case, as submitted to us, does not ft out categorically the various improvements in question, so as to able us, without too much labor, to ascertain whether all the patents d applications in controversy are of that class, or only a portion, and, a portion, what portion. It being plain that at least some of them e, we will remit to the Circuit Court the working out of the details reference thereto.

The complainant contended in the Circuit Court that all the inven-ons of the class in question came under the terms of the contract in igation. The respondent contended that such inventions should be tirely excluded, and that the contract has no relation to them what-er. In the course of the opinion, the court stated that the interpre-tion of the respondent was too narrow, and contrary to the intention the parties, which was undoubtedly correct. On the other hand, the ecree directed that an undivided half of each of all such inventions ust be assigned, and the injunction was ordered accordingly. This as, perhaps unintentionally, too broad.

Paragraph 4 of the contract makes it plain that the complainant as not to have the free use of the respondent's inventions, except in or relative to organs," as expressly set out in the second paragraph; nd there is nothing to show that the complainant has made any offer

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for compensation with reference to pianos according to paragraph so as to entitle it to use the respondent's inventions in connection wi them.

The solution is a simple one. Apparently the position is one whi the contract did not foresee, as often occurs; that is, that there wou be inventions covering organs which were also appropriate for oth musical instruments. Under such circumstances, whatever the cor mon law might do, equity has no difficulty in adjusting itself to t unexpected conditions. Here it can decree that there should given assignments, or perpetual licenses, so far only as concerns wh is expressed in the second paragraph of the contract; that is, "in relative to organs, both keyed and automatic." In doing this, equi does not make a new contract, but it merely applies the existing one the unexpected conditions. It also avails itself of the fundament rule that those seeking equity must do equity, and so it grants reli to the complainant only on its assent to such limitations and qualific tions as will prevent injustice. The practical application of this maxi to cases of the class before us has been illustrated an indefinite numb of times. Oddly enough, two decisions at the same early term of t Supreme Court give such an illustration and also a qualificatio Hunt v. Rousmanier, 1 Pet. 1, 7 L. Ed. 27, declares that equity ca not make a new contract; but Mechanics' Bank v. Lynn, 1 Pet. 37 383, 7 L. Ed. 185, states the general rule which controls this case, follows:

"But the court ought not to decree performance according to the letter wh from change of circumstances, mistake, or misapprehension, it would be conscientious so to do. The court may so modify the agreement as to justice as far as circumstances will permit, and refuse specific execution, less the party seeking it will comply with such modification as justice quires."

Our conclusion is that the phraseology of the decree which is co plained of in the fifth alleged error assigned should be corrected we have stated, and that, so far as concerns the second paragraph the contract in issue, the decree should be so modified that assig ments, or, if found necessary, perpetual licenses, be ordered, a that whichever are ordered, licenses or assignments, they be so limit as not to go beyond the purposes of the contract as we have alrea explained them; and all injunctions must be likewise so limited.

The decree of the Circuit Court is reversed; the case is remanded that court, with directions to enter a modified decree in accordance wi our opinion passed down this day; and the appellant recovers his co of appeal.

NOTE.

**Conditions and Provisions for Relief to Defendant in Decree in Action for Specific Performance.**

I. In General.

[a] (U. S. 1869) Where specific execution which would work hardsh when unconditionally performed would work equity when decreed on con tions, it will be decreed conditionally.—Willard v. Tayloe, 75 U. S. (8 Wa 557, 19 L. Ed. 501.

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›] (U. S. 1869) Where a lease providing for an option to purchase at a l price was made in 1854, and the option was accepted in 1864, after a t increase in the value of the property, and payment was tendered in l tender notes which were greatly depreciated and had been introduced the currency since the contract was made, specific performance was de- d in behalf of the lessee purchaser only on condition of payment in coin. 'illard v. Tayloe, 75 U. S. (8 Wall.) 557, 19 L. Ed. 501.

] (Colo. 1906) Where defendants, in a suit for specific performance, ded affirmative defenses, and by way of counterclaim set up a right in nselves to a conveyance from the record owners, brought in cross-parties, prayed that they be decreed to be the owners and placed in possession he premises, and for further equitable relief, it was proper for the court, inding against defendants on their counterclaim, to render a decree di- ing a conveyance to a cross-defendant of all defendants' interest in the nises.—Franklin v. Burris, 84 Pac. 809.

l] (Ill. 1873) On a bill by a vendor of lands, against the guardian of the s of a deceased vendee, for a specific performance or rescission of the ract of purchase as the court may direct, the court should act for the s' best interests, and should decree a rescission of the contract if their rests would thereby be promoted; but if the guardian has sufficient funds, the heirs' interests would be best promoted thereby, the guardian should rdered to pay the balance of the purchase money due, and take a deed he heirs, or an order should be made that their interest in the contract offered for sale, and be sold, if it will bring more than the amount the s would have to pay.—Greenbaum v. Austrian, 70 Ill. 591.

] (Ill. 1894) Where a railroad company files a bill for the specific en- ement of a contract to convey to it land over which it has built its road, the defendant claims that the contract has been obtained by fraud, the t may, on cross-bill, decree payment of just compensation for the land aken by the company.—Grand Tower & C. G. R. Co. v. Walton, 150 Ill. 428, N. E. 920.

] (Iowa, 1904) A vendor against whom a decree for specific performance wing the purchaser to retain one-third of the purchase price against the ingency of failure to convey the vendor's wife's interest has been en- l, is not entitled to interest on the amount retained by the purchaser.— lford v. Smith, 123 Iowa, 41, 98 N. W. 377.

] (Iowa, 1904) Where a contract for the sale of land provided that, if vendor should fail to furnish an abstract showing good title and execute ed, he should return to the vendee the money paid under the contract, in a suit by the vendor for specific performance, it appeared that the lor could not furnish good title, and had not taken the steps pointed out he contract for a deduction from the purchase price in case the title to portion of the premises should prove defective, the vendee was entitled decree for the money paid under the contract.—Wold v. Newgard, 123 a, 233, 98 N. W. 640.

] (Kan. 1895) Plaintiff was employed to prosecute to judgment a suit husband and wife to recover a homestead, the conveyance of which to ndant the wife signed while insane, under a recorded contract, whereby as to receive one-half the land recovered. *Held*, that on recovering judg- t he was not entitled to a conveyance without repayment to defendant ne-half the money paid by it for the land, and that defendant was entitled nprovements placed on the land by it while in possession under its deed. peka Water Supply Co. v. Root, 56 Kan. 187, 42 Pac. 715.

] (Mich. 1888) A decree for specific performance of a contract to sell erty made the purchase money a lien on the land in favor of defendant, complainant was ordered to assume certain unascertained debts owed ly by herself and defendant. *Held*, that such debts should be ascertained included in the amount due defendant as purchase money.—Johnson owler, 68 Mich. 1, 35 N. W. 764.

] (Mich. 1905) A court, decreeing a specific performance of a contract the purchase of an interest in land, has no power to decree, on the

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purchaser's failure to pay the price, a lien on any interest he may have in the land, except the interest which the complainant contracted to sell.—Van Norsdall v. Smith, 141 Mich. 355, 104 N. W. 660, 12 Detroit Leg. N. 478.

[k] (Mo. 1905) Where, in an action for specific performance by the vendor against a vendee in possession, the defense is that plaintiff has no title to part of the land, defendant may surrender possession of that part, and insist upon performance as to the remainder, with an abatement of the purchase money.—Lanyon v. Chesney, 186 Mo. 540, 85 S. W. 568.

[l] (N. J. 1881) In 1870, defendants, in consideration that the M. railroad company would construct a depot on the premises, and stop a specified number of trains there for ten years, and build the fences along the track, agreed in writing to convey to the company the lands necessary for its track and depot. The company took possession at once, and built their track, but nothing more. In 1875, under the foreclosure of a mortgage, all of the M company's property was sold, and a new company organized. In 1878, under a foreclosure against the latter company, all of its property was sold, and another company (complainant) formed. After complainant had been incorporated, defendants began ejectment to recover their lands, and this action was enjoined by complainant and relief in equity sought. Defendants answered, protesting against the specific performance of their contract, and expressing a willingness to convey the premises to complainant, on receiving compensation therefor, and damages assessed as of the date when the M company took possession. *Held*, that they were equitably entitled to have their compensation and damages so assessed.—New York & G. L. R. Co. v Stanley's Heirs, 34 N. J. Eq. (7 Stew.) 55.

[m] (N. J. 1888) Where specific performance of an exchange is refused for mistake in regard to the subject-matter, defendant, having set up, by cross bill, payment of the boot money, and asked for its repayment, is entitled to that relief.—Hess v. Evans, 15 Atl. 310.

[n] (N. Y.) The compensation for the deficiency, in cases where part performance is decreed, should consist in an abatement from the price, for the diminution in value of the whole property, in consequence of defects or incumbrances, and not in a deduction of what might be supposed to be a proportionate part of the whole price, for a part not conveyed at all, with a conveyance only of the residue.—(1862) Gilbert v. Peteler, 38 Barb. 488 (1868) Id., 38 N. Y. 165, 97 Am. Dec. 785.

[o] (N. Y. 1870) Compensation to the defendant purchaser must be provided for, in the decree enforcing specific performance of a contract, where the deficiency, defect, or whatever is complained of, is of such a character that it can be made the subject of compensation, or of consideration as damages, and where the court concludes that the purchaser would not have declined the contract had he known of the defect or matter complained of at the time of the purchase.—Beyer v. Marks, 32 N. Y. Super. Ct. (2 Sweeny) 715.

[p] (N. Y. 1886) Where a purchaser brings suit for specific performance and abatement of the purchase price on account of incumbrances, and it appears that the vendor would have discharged all the legal incumbrances had not the purchaser insisted on a release also from a party wall agreement, which the court held to be no incumbrance, and the vendor is required to account for the rents and profits of the property, the purchaser should be charged legal interest on the purchase money.—Morrison v. Bauer, 4 N Y. St. Rep. 701.

[q] (N. Y. 1887) Upon judgment for defendant on the ground of defective title, he can recover his expenses in the examination of the title.—Raynor v Lyon, 46 Hun, 227.

[r] (N. Y. 1893) Plaintiff executed an agreement to convey a right of way through his land to the H. railroad company for a nominal sum, the company to build a fence on both sides, whereupon the company took possession built and operated its road, and executed a mortgage on the same, and thereafter consolidated with defendant railroad company, which after the consolidation acquired the mortgage title by purchase at foreclosure sale in proceedings wherein plaintiff was not a party. *Held*, in ejectment, where de

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ınt set up its mortgage title, and asked for specific performance of plain- agreement, that a decree directing plaintiff to execute a deed upon de- ınt's building the fence, and paying damages for not having built it e will not be disturbed.—Helmke v. New Jersey & N. Y. R. Co., 66 Hun, 21 N. Y. Supp. 345, judgment affirmed (1894) 143 N. Y. 648, 37 N. E. 824.

(N. Y. 1904) Plaintiff sought specific performance of a contract for the ıase of land, and a conveyance free from a particular objection, which lleged prevented his taking title. Defendants answered that the ob- ons to the title had been waived, and plaintiff replied that the par- r objection stated in his complaint was not included in that waiver. ıdants offered judgment requiring them "to specifically perform their act with plaintiff referred to in the complaint herein, by conveying ıintiff a good and marketable title to the premises in said contract de- ed, free from all adverse claims referred to in such complaint, together costs." *Held*, that the court was not authorized, on entering judgment ch offer, to charge plaintiff with interest on the unpaid purchase price, declare a forfeiture by plaintiff of payments made on account, upon his e to comply with the judgment.—Abel v. Bischoff, 99 App. Div. 248, Y. Supp. 990.

(Tex. 1866) Where a specific performance of a contract is decreed aft- e plaintiff has been in default in regard to payments under it for many , it is error to adjudge the defendant only the amount that was due the default was made.—Roberts v. Lovejoy, 28 Tex. 641.

(Va. 1817) In decreeing specific performance of a contract for the sale ıd at the instance of the devisee of the purchaser, the lien of the ven- or the purchase money ought to be reserved to him.—Hundley v. Lyons, nf. 342, 7 Am. Dec. 685.

(Va. 1872) To a bill by a vendor to rescind or to enforce specific per- ınce of the contract, the purchaser answered, not objecting to specific tion thereof, but insisting upon being compensated for injuries to which ıd been subjected by the vendor's failure to comply, etc., and by the neddling of the vendor's agents, etc. *Held*, that the court might, as ary to the decree of specific performance, decree such compensation, to certained either by a commissioner or by an issue of quantum damnifi- —Nagle v. Newton, 22 Grat. 814.

(Va. 1902) A suit for specific performance of a sale of land will be ıed for an accounting and a decree thereon—the purchaser having paid of the purchase money—though the title is not such that specific per- ınce can be decreed.—McAllister v. Harman, 101 Va. 17, 42 S. E. 920.

(W. Va. 1883) Under a compromise on a contract for the sale of the vendees gave up possession, and the heirs of the vendor took pos- n, during whose occupancy the land was condemned for damages and tain sum awarded them as damages; after which they appealed from ecree enforcing the compromise, and it was reversed, and the original act under which the vendees had made part payment required to be ced. *Held*, that the vendees were entitled to be allowed on their debt to the amount of said damages.—Layne's Adm'r v. Johnson, 22 W. 51.

(W. Va. 1887) A married woman who, on refusing to complete a con- of sale, is decreed to hold her land subject to a lien for the purchase y paid, is entitled to have abated from the purchase money so paid ır rental value of the land while the purchaser had the same in pos- n, in the condition in which it was at the time he took possession of.—Moore v. Ligon, 30 W. Va. 146, 3 S. E. 572.

### II. Removal of or Compensation for Improvements.

(Iowa, 1904) A lease for a term of five years stipulated that the les- ıould have the privilege of buying the premises during the term for a ied sum. The premises were located in a municipality where there een no paving of streets at the time of the lease. The premises abutted side street, and not one of the main thoroughfares. After the making

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of the lease the city caused the street in front of the premises to be pa
at the cost of the abutting owners. *Held*, that as the parties, when ente
into the agreement, could not have anticipated the action of the municipa
the court was warranted in requiring the lessee praying for specific
formance to reimburse the lessor for the amount already paid for the pa
and to assume the balance as a condition for granting relief.—King v. R
123 Iowa, 632, 99 N. W. 306.

[b] (Iowa, 1904) The fact that the lessor, prior to the lessee's electio
purchase, determined to accept the improvement and pay for it, and w
any irregularities in the letting of the contract under which the impr
ment was made is immaterial.—King v. Raab, 123 Iowa, 632, 99 N. W.

[c] (Mass. 1856) This court, as a court of equity, may, upon motion m
by the defendant at any stage of a suit for the specific performance
contract to convey land, allow him, before conveying the land, to rem
buildings which he has erected thereon under a claim of right, though ere
after notice that the plaintiff claimed the land.—Fitzgerald v. Clark, 72 M
(6 Gray) 393.

[d] (Mass. 1885) Upon a decree for specific performance for the con
ance of land defendant should be allowed for the cost of pulling down
buildings for the purpose of improving the property.—Eastman v. Simp
139 Mass. 348, 1 N. E. 346.

[e] (N. J. 1888) Land was conveyed under an oral agreement that a
tion should be reconveyed, and both deeds were delivered, to be recor
to an agent, who destroyed the deed of reconveyance, and had another
ecuted, covering less land. After a decree for specific performance of
agreement to reconvey, defendant amended his answer asking compensa
for improvements. *Held*, that both parties having been in laches, compe
tion should be allowed for permanent improvements, though defendant
been somewhat too aggressive in making improvements after notice.—L
v. Penrose, 44 N. J. Eq. (17 Stew.) 464, 15 Atl. 261.

[f] (N. Y. 1892) Where defendant negligently delays conveying and
livering possession until an assessment for improvements is levied aga
the land, and on being sued for specific performance asks that he
permitted to convey with warranty as of a date before the levy, the in
vention of the assessment in question, and the dealings of the parties
sidered with reference thereto, constitute no "mistake of law or fact"
"accident" entitling defendant, the vendor, to the relief asked.—Gotthel
Stranahan (City Ct. Brook.) 19 N. Y. Supp. 161, judgment affirmed (1893)
N. Y. 345, 34 N. E. 286, 20 L. R. A. 455.

[g] (N. D. 1903) Where the holder of a contract for the purchase of
estate knows that the owner has conveyed to another, and that the la
though chargeable with constructive knowledge of his contract, honestly
lieves that he has a perfect title, and is induced by such belief to make v
ble improvements, and yet the holder of the contract makes no protest p
to the institution of an action for specific performance of the contract,
is not entitled to a decree as against the vendee, except on reimbursemen
the latter for such permanent improvements made before the commencem
of the action.—Hunter v. Coe, 12 N. D. 505, 97 N. W. 869.

[h] (Va. 1842) On a bill for specific performance by the vendor, where
vendee has performed his part, but the vendor has neglected to make
until the circumstances have materially changed, making it inequit
to enforce performance, the vendee will be decreed to release his ri
under the contract, to deliver up the land, and account for the rents
profits, and to have returned to him the purchase money which he has p
with interest, and to have the value of the permanent improvements made
him on the land set off against the rents and profits, provided the va
of the improvements do not exceed the rents and profits.—Bryan v. Loff
Adm'rs, 1 Rob. 12, 39 Am. Dec. 242.

### III. Reformation and Rescission of Contract.

[a] In decreeing specific performance, the court may so modify the ag
ment as to do justice as far as the circumstances will permit, and ref

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c execution unless the party seeking it will comply with such modifica-
justice requires.
. S. 1828) Mechanics' Bank v. Lynn, 26 U. S. (1 Pet.) 376, 7 L. Ed. 185;
enn. 1835) Mitchell v. Nicholson, 16 Tenn. (8 Yerg.) 194.
(U. S. 1851) Where one party to a contract in writing brings a bill
ity for a specific performance thereof, and the defendant, in his an-
submitting to a specific performance of the real agreement, alleges
he written contract was entered into by mistake, and under a mis-
ension of the facts, and establishes this by evidence, he is entitled to a
c performance of the agreement as proved, even against the claim of
aintiff to have his bill dismissed.—Bradford v. Union Bank of Tennes-
U. S. (13 How.) 57, 14 L. Ed. 49.
(Minn. 1889) In an action for specific performance, when the contract
ased on a common and material mistake of the parties, the court may
ffirmative relief by rescinding it.—Thwing v. Hall & Ducey Lumber
Minn. 184, 41 N. W. 815.

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Fed. 373.)

RS v. MERCHANTS' & FARMERS' BANK OF PONCHATOULA, LA.

(Circuit Court of Appeals, Sixth Circuit. November 27, 1906.)

No. 1,538.

ARANTY—CONSTRUCTION OF CONTRACT.

Defendant became guarantor of loans to be made by plaintiff bank to a
ird party to the amount of $10,000. When plaintiff had in fact lent
ch party an amount in excess of $10,000, defendant by telegram and
tters authorized a further extension of credit on his guaranty to the
xtent of $2,000, "making $12,000, all told." It did not appear that he
ad any knowledge that the amount then owing exceeded the $10,000
uarantied by him. *Held*, that the second guaranty did not cover such
xcess, but only such amount as was thereafter lent, not exceeding $2,000.

ME—CONSIDERATION.

The making of further loans by a bank to a debtor, at the request of a
uarantor, is a sufficient consideration for a guaranty of the prior in-
ebtedness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guaranty, § 14.]

ME—RIGHTS OF GUARANTOR—APPLICATION OF MONEY COLLECTED FROM
RINCIPAL.

Where a bank, which held a mortgage securing a part of a customer's
ndebtedness, another part being secured by defendant's guaranty, and still
nother part being unsecured, obtained a judgment against the principal
ebtor for the whole indebtedness, reserving its right to proceed on the
ortgage, the fact that it sold the mortgaged property under an execution
n the judgment, instead of foreclosing the mortgage, was not prejudicial
defendant, and did not deprive the bank of the right to apply the pro-
eeds in payment of the mortgage debt; but it was required to apply any
urplus pro rata on the entire remaining indebtedness.

Error to the Circuit Court of the United States for the Western
ict of Michigan.

E. Knappen, for plaintiff in error.
M. Wilson, for defendant in error.

fore LURTON and SEVERENS, Circuit Judges, and COCH-
, District Judge.



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SEVERENS, Circuit Judge. Thompson and Ackley united in partnership under the style of the Ponchatoula Lumber Company, a on or about November 17, 1903, engaged in the business of manufact ing and selling lumber and kindred products at Ponchatoula, La., a for those purposes required money. They borrowed, at some d prior to January 12, 1904, the sum of $200 of the Merchants' & Far ers' Bank of Ponchatoula, for which they gave their note payable demand. On the said 12th of January the bank being unwilling make further loans to the lumber company without security, R. Peters, the plaintiff in error, telegraphed to the bank as follows:

"Chicago, Ill., January 12, 1904

"Merchants' & Farmers' Bank, Ponchatoula, La.

"I will guarantee $10,000 credit to Ponchatoula Lumber Co.

"R. G. Peters."

On the faith of this telegram, the bank, prior to the 19th of t month made further loans to the lumber company to the extent of $ 600. On that day Peters, in confirmation of his telegram, as the d laration alleges, executed a more formal guaranty to the bank as f lows:

"Ponchatoula, La., Jan. 19, 1904

"The Merchants' & Farmers' Bank, Ponchatoula, La.

"Gentlemen: I hereby guaranty to you the payment to the extent of $ 000.00 of any and all notes, drafts, bills of exchange, checks, credits, discou overdrafts, etc., of the Ponchatoula Lumber Company, or bearing their dorsement, which have been or may be accepted by you and credited to t account. This guaranty to remain in full force and effect until you shall h received from me notice of its withdrawal, which notice however, shall affect any notes, drafts, bills of exchange, checks, credits, discounts, overdra etc., not paid at the time of the receipt by you of such notice.

"Yours respectfully, R. G. Peters."

And on the faith of these guaranties the bank made further loans the lumber company until March 10, 1904, when the amount, incl ing the $1,600, and also including the $200 loaned before the first gu anty was given, had reached $10,000 as the declaration states, but the finding of the judge is, $10,682. On the day last mentioned, Pet sent to the bank the following telegram:

"East Lake, Mich., 3—10—1904

"Merchants' & Farmers' Bank, Ponchatoula, La.

"Extend credit Ponchatoula Lumber Company to $12,000 temporary.

"R. G. Peters."

On the day following he sent this letter:

"Manistee, Mich., March 11, 1904

"Merchants' & Farmers' Bank, Ponchatoula, La.

"Gentlemen: Confirming my telegram of yesterday, you are authorized grant Mr. Thompson credit upon my guaranty for two thousand dollars m as he requests it, temporarily, making $12,000 all told.

"Yours respectfully, R. G. Peters."

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And on March 15, 1904, he sent to the bank the following letter:

"Manistee, Mich., March 15, 1904.

"Merchants' & Farmers' Bank, Ponchatoula, La.

"Gentlemen: In reply to yours of 11th inst., will say that my guaranty for $2,000 more credit to the Ponchatoula Lumber Company, making $12,000, will hold good until they are able to pay the $2,000 as you outline in your letter.

"Yours respectfully, R. G. Peters."

The declaration states that the bank accepted the last-mentioned telegram and these two letters of March 10th and March 15th "as the guaranty of said defendant for loans to said Thompson and Ackley doing business under the name of the Ponchatoula Lumber Company, to the amount of two thousand dollars ($2,000.00) in addition to the said loans to the amount of ten thousand dollars ($10,000.00)." After this extension the bank loaned the lumber company $1,500 more. None of the loans mentioned in the foregoing statements were repaid. This suit was brought on the guaranties of Peters to recover the amount of said loans. It further appears that another series of loans, quite independent of the loans guarantied by Peters as above stated, were made by the bank to the lumber company, commencing November 17, 1903, which were secured by the assignment to the bank of bills of lading on shipments of lumber to customers. These securities did not yield enough to satisfy the loans they were given to secure, and on August 8, 1904, the lumber company gave the bank a mortgage on its mill property for the balance due on this line of indebtedness, then estimated at the sum of $3,000. The sum actually due proved eventually to be $2,209.01. Prior to the giving of the last-mentioned mortgage, the lumber company had mortgaged the property to Peters for his indemnity; but, for the purpose of enabling the mortgagor to sell the property, Peters had released the mortgage. The sale was not effected, and, when Peters heard of the mortgage to the bank, he wrote to the latter a notification as follows:

"That must be applied on the guaranty loan; also any surplus that he [meaning Thompson] may be able to get for the mill in selling it."

There is nothing to show that the bank assented to this. Finally, the bank brought suit in a Louisiana court against the Ponchatoula Lumber Company to recover the balance due on both lines of indebtedness, and in its petition the bank noted, in connection with the averments touching the balance due on the line other than that guarantied by Peters, that the note for that balance was secured by a mortgage. The judgment of the court in favor of the bank was for $14,394.62 and interest, with costs. The judgment further provided that "the plaintiff's right to proceed on the $3,000 mortgage be reserved." Execution was issued, and the property sold; the net proceeds being $2,390.79. In the sheriff's return to the execution, he stated that:

"The mortgage in favor of plaintiff in execution for $3,000, extinguished by confusion, is canceled; but the plaintiffs reserve all their rights against defendant in execution so far as not satisfied by this execution."

The bank applied the proceeds of the sale as follows: Paid itself the $2,209.17 balance due on the mortgage debt, and applied the re-

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maining $181.78 to the excess of the lumber company's debt over $12,000 guarantied by Peters.

The questions submitted to us on the hearing were these: (1) W the $200 loaned to the lumber company before the original guara covered by either of the guaranties? (2) Was the excess beyo $10,000, which the bank had already loaned to the lumber company the time of the further guaranty of March 10, 1904, covered by su further guaranty? (3) Had the bank the right to apply the proce of the sheriff's sale to the satisfaction of the balance due on the d secured by the bills of lading? (4) Had the bank the right to ap the remaining $181.78 to the excess over $12,000 due on the other lo to the lumber company? The court below found all of these questi in the affirmative, and rendered judgment for the amount of $12,0 with interest and costs.

As to the $200 loan, whatever we might have said in regard to guarantor's liability, if the question had been saved, we think we c not examine it on this record. The only point made by the defe ant below on this item was that there was no consideration for it. T exception to the court's conclusion of law was to the holding that " loaning of further sums of money to the Ponchatoula Lumber Co pany pursuant to defendant's guaranty of January 12, 1904, was a s ficient consideration for the guaranty of the payment by the defend of the $200 loaned to the company before the guaranty was mad which impliedly concedes that there was in fact a guaranty for t sum. It nowhere else appears that the contention that the item ca within the scope of the guaranty was disputed. The objection actua made could not be maintained. The making of further loans wa sufficient consideration for a promise to pay a sum already advan as well as the further loans.

With respect to the excess beyond $10,000 which the bank had lo ed to the lumber company before March 10, 1904, we are constrai to think that the additional guaranty of that date was not intended cover it. It is not found that Peters knew that such excess had b loaned, and what is not made to appear should be treated as not ex ing. In the absence of such information, he would reasonably h supposed that his guaranty had not been exceeded. In his telegr of March 10th he said: "Extend credit to Ponchatoula Lum Company to $12,000." This language would seem to import fut loans, which, with what he had already guarantied, might go to $1 000. The court below, not having regard to the letters which follo it, construed the telegram to cover former advances, whether they h been made upon a guaranty or not. This suggestion, however, mi not be decisive. But in his letter of the following day, confirming telegram, he makes it clear, as we should think, when he said:

"You are authorized to grant Mr. Thompson credit for two thousand d lars more as he requests it, making $12,000 all told."

This imports a guaranty upon a credit thereafter to be given. Th in reply to a letter of the bank written on the day after the receipt the telegram, he further says:

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**Ay guaranty for $2,000 more credit to the Ponchatoula Lumber Company, king $12,000, will hold good until they are able to pay the $2,000."**

And we think the bank correctly interpreted the telegram, with the planatory letters, when in its declaration it averred that it accepted m "as the guaranty of said defendant for loans to said Thompson Ackley, doing business under the name of the Ponchatoula Lum- Company, to the amount of two thousand dollars ($2,000.00) in ition to the said loans to the amount of ten thousand dollars ($10,- .00)," and that the judge erred in ignoring the letters and holding t the telegram indicated a purpose to cover former advances not ered by his former guaranty. There is nothing in this correspond- e to indicate that it was intended to cover previous loans, as was e in the guaranty given on January 19th, which was so expressed o cover the advances which had been made before that date.

Then, as to the appropriation made by the bank of the proceeds of sale on execution, the bank had a mortgage upon the property, and btained a judgment directing a sale, reserving to the bank the right proceed upon the mortgage. But we are of opinion that the bank ght waive this reservation and allow the sale to be made of the prop- without it, and appropriate the proceeds to the debt secured by the rtgage. The right of no one would be prejudiced by this course, the indications from the sheriff's return and the appropriation of proceeds of the sale by the bank are that the sale was of the entire te in the property. If that was so, the appropriation was justifiable, he mortgage was a valid one. Counsel for plaintiff in error argued somewhat vague way that, the release of the mortgage by Peters ing been done for the purpose of enabling the lumber company to the property, it was inequitable for the bank to take advantage of release and get a mortgage for its own benefit. But the failure to the property did not restore the mortgage, and there is no ground holding that the mortgage to the bank is affected by the mortgage ch Peters had, but released without reservation. His motive or ect did not effect the consequences of the release.

n respect to the item of $181.78, it was misapplied. It should have n applied to all the indebtedness remaining unpaid, pro rata; that is ay, upon the sum loaned and guarantied by Peters, which was $11,- , and the sum loaned by the bank in excess of $10,000 before the ranty of March 10, 1904, was given, which was $682. It was prop- o include interest in the judgment rendered by the court below.

The judgment will be reversed, with costs, and with directions to er a judgment in conformity with this opinion.

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**) Fed. 377.)**

CARSON et al. v. THREE STATES LUMBER CO.

**(Circuit Court of Appeals, Sixth Circuit. December 4, 1906.)**

**No. 1,536.**

DGMENTS—DECISIONS OF STATE COURTS—RES JUDICATA.

Plaintiffs, having conveyed the timber on certain land in 1893-94, without fixing a time for the removal thereof, instituted a suit in 1901 against defendant which had acquired such timber rights to restrain it

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**from removing the timber, on the theory that defendant was only tled to a reasonable time to remove the same, which had then ela The bill prayed that, in case a reasonable time had not elapsed, court should fix a time within which the timber should be removed. state Supreme Court, reversing a decree sustaining complainant's tention that a reasonable time had elapsed, *held* that, under the evid disclosed, a reasonable time would not elapse until November 1, 1903, dismissed complainant's bill. *Held* that, though the decision fixing time was contained only in the state court's opinion and not in its de it was, nevertheless, within the issues tendered by the bill, and was judicata of complainant's right to recover the value of timber cut the land by defendant prior to the date so fixed.**

**[Ed. Note.—Conclusiveness of judgment as between state and fe courts, see Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. Union & Planters' Bank of Memphis v. City of Memphis, 49 C. C. A.**

In Error to the Circuit Court of the United States for the Wes District of Tennessee.

For opinion below, see 142 Fed. 893.

B. Pierson, for plaintiffs in error.

W. A. Percy, for defendant in error.

Before LURTON and SEVERENS, Circuit Judges, and CO RAN, District Judge.

COCHRAN, District Judge. This was an action brought Nover 6, 1905, by the plaintiffs in error against the defendant in erro recover the value of the merchantable timber growing on a ce tract of land in Lake county, Tenn., cut and removed therefron the latter between September 1, 1902, and November 1, 1903, all to be $65,000. The defendant claimed title thereto through the p tiffs. By deeds dated, respectively, February 14, 1893, and Jul 1894, plaintiffs, being then the owners of the land and timber conveyed the latter to certain vendees, and title thereto, prior t being cut and removed, had passed from said vendees, mediatel the defendant by proper deeds of conveyance. The deeds from p tiffs contained no provision as to the time in which the timber sh be cut and removed. They were silent on the subject of its being and removed. Plaintiffs, notwithstanding their deeds, claimed to the timber at the time it was cut and removed, and in this It was an implied condition of them that the timber was to be cut removed in a reasonable time. By September 1, 1902, after w the cutting and removal began, a reasonable time had elapsed. the lapse thereof the title to the timber reverted to plaintiffs.

The declaration, besides setting forth plaintiffs' claim of title t timber, graciously alleged facts that might be claimed by defen to operate against their claim. Those facts are these: May 11, 1 plaintiffs brought a suit in equity in the chancery court of county, Tenn., against defendant. At that time the timber had been touched. In the bill plaintiffs asserted title thereto on the gr that a reasonable time for it to be cut and removed had then ela and prayed an injunction against defendant, restraining it from cu and removing the timber. They prayed also that, "if the comp ants should be mistaken as to the defendants having had a reaso

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e in which to remove the said timber from the said land, then will court fix and determine what will be a reasonable time in which y must remove the timber." The defendant answered, denying a reasonable time had then elapsed, and claiming the right to cut remove the timber whenever it pleased. Proof was taken and n submission of the cause. Said chancery court rendered a decree olding plaintiffs' contention and enjoining defendant from cutting removing the timber. An appeal was taken from that decree by endant to the Supreme Court of Tennessee. That court on May 1902, handed down an opinion holding that the decree of the lower rt should be reversed, and thereupon entered a decree dismissing plaintiffs' bill. The opinion is reported in 108 Tenn. 681, 69 S. 320. It was handed down by Judge Beard on behalf of the court. t, after considering the question as to whether those claiming under ntiffs' deeds had an unlimited or only a reasonable time in which cut and remove the timber, and holding the latter and noting, but sing by the question as to the effect on the title thereto of their ure to cut and remove it in such time, he concluded as follows:

Ve are satisfied, after a careful examination of all the evidence in the rd, a reasonable time within which the grantees and their assigns could ove the timber covered by the contract had not expired when the present was filed. It is estimated that in 1893 there was standing on the land 1 16,000,000 to 18,000,000 feet of timber. The land, or the greater part , was low and swampy, and subject to overflow from the Mississippi river. the time of the making of the contract, and until their sale in 1896 to hugh, Hull and Polhemus looked alone to periodic overflows to float out logs they cut. In the winter of 1893-94 they succeeded in getting out about 0,000 feet, and, in anticipation of having another overflow, they had cut tionally 2,000,000 or 3,000,000 feet, but were not able to get it out on ac- t of its failure. Mr. Hull says this timber was lost to his firm, and lying the ground, worm-eaten and worthless, when they made their sale in . The evidence shows that to haul this timber to the Mississippi river ld have entailed a heavy loss to these parties, and at the time they were ating floating logs in an overflow was regarded as the only feasible plan etting them to market. Since then tramways and steel roads for that ose have come into use. In 1898 the Three States Lumber Company con- ted with their codefendant Peck to erect a sawmill near the land, and the trees remaining on it, and convert them into lumber, and when this was filed he was constructing a steam railroad into the body of this er, and was actively engaged in fulfilling his contract. Many witnesses ify as persons having long and large experience in such work, and their nates of a reasonable time for removing timber under this contract was 1 6 to 13 years. After weighing all the testimony, we have concluded a period of 10 years from the 1st of November, 1893—this date being mid- between the two deeds—is, in view of all the conditions developed in the ence as existing or likely to exist, a reasonable period. There, however, be excluded the time which has been lost to the defendants by reason of pendency of the injunction in this case. This bill is therefore dismissed, ost of complainants."

t was held, therefore, not only that a reasonable time had not sed when the bill was filed, but also that 10 years from November 893—i. e., by November 1, 1903—was a reasonable time. In this er particular the prayer of the bill that the court in the event it uld hold that a reasonable time had not elapsed when the bill was l should fix and determine what was a reasonable time was an-

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swered. The decree entered by said court pursuant to said opini is in these words:

"This cause came on to be heard upon the transcript of the record fr the chancery court of Lake county, Tennessee, and it appearing to this co that in the decree of the chancellor there is manifest error, this court bel of the opinion that complainants' bill should have been dismissed, it is the fore ordered, adjudged, and decreed by the court that the decree of the co below be reversed and the bill dismissed, and that the defendant compa have and recover of complainants, S. B. Carson and wife and Mat Pate, a J. B. Carson and G. F. Carson, sureties on prosecution and injunction bon all the costs of this court for which let execution issue."

The plaintiffs claimed that, notwithstanding these facts, they we the owners of the timber and entitled to recover its value. They leged them in the declaration in order that their effect might be rais by and determined by demurrer. The defendant demurred to t declaration, and the lower court, upon consideration of the demurr sustained it and dismissed the declaration. It is to this judgment th the writ of error herein is taken.

The writ presents for determination by this court the question to the effect of said facts on plaintiffs' claim to said timber. By re son of them were or not plaintiffs estopped to assert that they had ti to the timber at the time it was cut and removed? Is or not it r judicata that at that time a reasonable time had not elapsed in whi to cut and remove it? It is certain that the Supreme Court of Tenn see in its opinion in said former suit held that a reasonable time wou elapse by that time, and not until then. Upon what ground, if an is it to be said that that holding is not res judicata?

Had the bill contained no prayer that the court, if it held that a re sonable time had not elapsed when the bill was filed, should fix a determine what was a reasonable time, it might be claimed, with so plausibility at least, that such holding was not res judicata. In th contingency the holding would have gone beyond the requirements the case. It would have required no more than that it should be dete mined whether a reasonable time had elapsed when the bill was fil At most, a holding as to what was a reasonable time would have be incidental merely to the holding that a reasonable time had not th elapsed.

It cannot be urged that said holding is not res judicata on the grou that, even though plaintiffs prayed for a determination of what was reasonable time, they were not entitled to any such determination. it not certain that they were not entitled to it. Possibly a vendor growing timber under circumstances such as existed with reference the timber in question at the time said suit was brought may, before reasonable time has elapsed, have a right to bring a suit against l vendee or subvendee to have it determined what is a reasonable ti in which to cut and remove the timber. His right to do so may co within the second class of the fourth group of equitable remedies point out in Pomeroy on Equity Jurisprudence, vol. 5, § 7, characterized section 5 as "suits by which some general right either legal or equital is established." But it is not necessary for us to say whether plai tiffs were entitled to any such determination. The defendants did n

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that they were not entitled thereto, but litigated the question with as to what was a reasonable time. The holding by the Supreme of Tennessee on the subject was not void. It cannot be claimed, fore, that said holding is not res judicata on this ground. Plain- n error do not so claim. The sole ground upon which they claim aid holding is not res judicata is that it is contained in the opin- nly, and not embraced in the decree. The terms of the decree mited to a dismissal of the bill. The necessities of this case do equire that we should consider this position on principle. It is sed of by a decision which is controlling upon us. That decision y the Supreme Court of Tennessee. It is State v. Bank of Com-, 96 Tenn. 591, 36 S. W. 719. An irrevocable provision in the er of the Bank of Commerce, a Tennessee corporation doing busi- n Memphis, Shelby county, Tenn., was to the effect that it should certain specific tax on its shares of stock, and that such tax should lieu of all other taxes. The bank claimed that by virtue of this sion it was exempt from the payment of general or ad valorem on its capital stock or surplus, and that its shareholders were ex- from payment of such taxes on their shares of stock. The state ht separate suits for the use of the city of Memphis and the y of Shelby against the bank and its shareholders, the latter nsent being represented by one of their number, in which it t to recover ad valorem taxes for certain years on either the l stock or the shares thereof; and, in any event, on the surplus. suits were brought in the chancery court for Shelby county. court held that the exemption covered all these taxes and dismiss- bill. On appeal to the Supreme Court of Tennessee that court that it covered only the taxes on the capital stock, and did not those on the shares of stock or surplus. State v. Bank of Com-, 95 Tenn. 234, 31 S. W. 993. The decree entered pursuant to inion was that the shareholders should pay the taxes sought to be ered on the shares of capital stock, and the bank those sought to covered on its surplus. Nothing was said in the decree as to the l stock not being liable to the taxes sought to be recovered on it. case was taken on error to the Supreme Court of the United s by the shareholders and the bank. That court held that the ption was limited to the shares of stock, and did not cover either apital stock or surplus. It therefore reversed the decree of the me Court of Tennessee as to the shareholders, and affirmed it the bank in so far as the surplus was concerned. It took no ac- s to said court's holding in regard to the capital stock, because ch of its holding had not been brought there on error and could ave been so brought. Bank of Commerce v. Tennessee, 161 U. 4, 16 Sup. Ct. 456, 40 L. Ed. 645.

the return of the case to the Supreme Court of Tennessee, the on behalf of the city and county, moved that court for a decree st the bank for ad valorem taxes on its capital stock. This mo- was denied notwithstanding it had been held by the Supreme t of the United States that the capital stock was liable thereto and n decree was silent on the subject. As to the decree being silent, e Gilham said:

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"In the decree no reference is made to the capital stock, nor does it terms adjudicate that the capital stock is not subject to general or ad volo taxation; but the opinion there delivered goes fully into this question, the court undoubtedly held that the capital stock was not subject to g eral taxation."

It did so because it had so held in its opinion. Judge Gilham sa

"The principal questions now raised are: (1) Was the liability of the ital stock to general taxation by this court at the last term adjudicat (2) If so, can we now readjudicate that question, and tax the capital sto The decree is silent on the subject, but the opinion is full and clear. No can read the opinion without understanding that this was one of the lead questions debated, considered, and by the court decided. In Fowlkes State, 82 Tenn. 19, this court, Judge Cooper delivering the opinion, has sa 'And even if the presumption, as stated by the referees, was that the dism al was on the merits, if the record leaves the matter in doubt, this co may look to the opinion of the court then delivered, which is also a rec to clear up the doubt.' The Supreme Court of the United States in a cent case (In re Sanford Fork & Tool Co., 160 U. S. 256, 16 Sup. Ct. 40 L. Ed. 414) say that the opinion delivered by the court may be consu to ascertain what was intended by its mandate. Upon authority we th it clear that we may look to the opinion, in connection with the decree ascertain what was intended to be and was by the court decided. Th suits were instituted to obtain a construction of the bank's charter and settle the question whether the charter tax was on the capital stock or on shares of stock in the hands of the shareholders, and to collect the gen tax from the one or the other, as the court might construe its charter locate the charter tax. The exemption of the capital stock from ad valo taxation was therefore necessarily involved, and was a vital issue of case. We understand it to be well settled that all the issues which m have been raised and litigated are concluded the same as if they had b directly adjudicated and included in the judgment or decree. Lindsley Thompson, 1 Tenn. Ch. 272; 21 Am. & Eng. Enc. Law, 216. We need however, rest our opinion on this doctrine; for, in the present case, very question was litigated both in the court below and in this court. are of the opinion, and therefore hold, that the decree of the last te construed in connection with the opinion, adjudged that the capital st of the Bank of Commerce was not subject to general taxation."

We gather from this decision that resort may be had to an opinion the Supreme Court of Tennessee, not only to ascertain the reasons the decree entered pursuant thereto, but also what has been decre In view of this decision, there can be no doubt that, if the action low had been brought in the state court of appropriate jurisdicti the holding of the Supreme Court of Tennessee in the former s as to what was a reasonable time in which to cut and remove the ti ber in a certain time would have been held by the state court to ha been res judicata. If it was res judicata there, it is res judicata he

In the case of Union & Planters' Bank v. Memphis, 189 U. S. 72, Sup. Ct. 604, 47 L. Ed. 712, Chief Justice Fuller, affirming this co in same case reported 111 Fed. 561, 49 C. C. A. 455, said:

"What effect a judgment of a state court shall have as res judicata i question of state or local law."

But, besides this, there is room to hold that the Supreme Court of United States was of the same opinion as the Supreme Court of Tenn see as to the point decided in the case of State v. Bank of Commer 96 Tenn. 591, 36 S. W. 719. The record of the case of State v. Ba

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of Commerce, 95 Tenn. 234, 31 S. W. 993, when before it in Bank of Commerce v. State, 161 U. S. 134, 16 Sup. Ct. 456, 40 L. Ed. 645, showed that the holding of the Supreme Court of Tennessee that the capital of the bank was not liable to the tax sought to be recovered was in its opinion and not in its decree, and yet it was recognized that it was binding on the city and county, and by virtue thereof and its holding both the capital stock and the shares of capital stock for the years in question would escape taxation. Mr. Justice Peckham said:

"We cannot, therefore, review the decision of the state court allowing the claim of exemption from general taxation of the capital stock of the bank, although the consequence is that in these cases both the capital stock and the shares of stock thereof in the hands of the shareholders escape all taxation other than the charter tax."

In thus limiting the consideration of the point made on behalf of plaintiff in error to this decision of the Supreme Court of Tennessee, with such support as it has from this remark of Mr. Justice Peckham, we would not be understood as intimating that we have any doubt on the subject on principle. This decision relieves us of the necessity of considering the matter on principle, or searching for decisions of other jurisdictions covering the question as to how far resort may be had to the opinion of an appellate court to determine what it has decreed or adjudged, or as to whether a holding in such an opinion not covered by the decree is res judicata.

The judgment of the lower court is affirmed.

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(149 Fed. 383.)

## McBATH et al. v. JONES COTTON CO.

(Circuit Court of Appeals, Sixth Circuit. December 14, 1906.)

No. 1,559.

1. SALES—CONTRACT—TIME FOR DELIVERY—ANTICIPATORY BREACH.

Plaintiff contracted to deliver 1,000 bales of cotton, of specified grades and at specified prices, on or before October 15, 1905, to a carrier, according to shipping directions to be furnished by defendants; plaintiff to pay cost and freight to Liverpool. About October 3d the point of delivery was changed; plaintiff agreeing to deliver at its warehouses in Birmingham and Decatur, Ala. On October 4th defendants sent an agent to Birmingham to receive cotton to be tendered there, and he, after accepting 100 bales, refused to examine or accept more, because the cotton tendered was not equal in staple to the contract quality. The agent was requested to go to Decatur and examine cotton to be tendered there, but refused, and on October 7th defendants, claiming a violation of the contract, gave notice of cancellation and thereafter refused to accept any further tenders. *Held*, that plaintiff had until October 15th in which to tender cotton complying with the contract, and that defendants' refusal to inspect and accept was premature, and entitled plaintiff to recover damage as for a breach of contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 222, 223, 362.]

2. SAME.

The rules applicable to an anticipatory breach of a contract apply as well to one party as to the other. The general rule applicable to a contract for sale and future delivery of articles not specifically designated is that a

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**buyer cannot reject a delivery conformable to the contract, when made in time, merely because there had been a prior tender of goods not conformable and rejected on that ground.**

**3. CORPORATIONS—FOREIGN CORPORATIONS—DOING BUSINESS WITHIN STATE.**

**Plaintiff, an Alabama corporation, with no warehouse, office, or domicile in Tennessee, contracted through a broker in Tennessee to sell cotton to defendants, to be delivered to a carrier in Alabama for foreign transportation and delivery. *Held*, that such transaction constituted interstate, and not local, commerce, and that plaintiff was not, therefore, doing business in Tennessee, within a statute of that state regulating foreign corporations.**

**[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 2520–2527.**

**Foreign corporations "doing business" in state, see Wagner v. J. & G. Meakin, 33 C. C. A. 585; Ammons v. Brunswick-Blake-Collender Co., 72 C. C. A. 622.]**

In Error to the Circuit Court of the United States for the Western District of Tennessee.

W. A. Percy, for plaintiffs in error.

Thos. M. Scruggs, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. The plaintiffs on September 29, 1905, contracted to sell to the defendants 1,000 bales of cotton, deliverable on or before October 15th to a carrier according to shipping directions to be furnished by the buyer; seller to pay cost and freight to Liverpool. The cotton was sold by samples of type and was described as follows: 200 bales fully good middling at 11⅛ cents per pound; 500 bales good middling at 11 cents per pound; 300 fully middling at 10⅞ cents per pound, "mutual allowance in weight"—a term signifying a reweighing at Liverpool, seller to be credited with gains over weights when delivered to carrier and charged with loss. Shipping instructions were sent October 3d. But about the same date the buyers requested a delivery of the cotton to a representative here. After some objection the seller agreed to deliver what they could at their warehouse in Birmingham, Ala., and the rest at Decatur, Ala. On October 4th the buyers sent an agent to Birmingham to receive cotton there to be tendered. The agent brought with him samples, and claimed that the cotton to be received must correspond in staple. He proceeded very leisurely and with much circumspection. The first day, out of a much larger number of bales, he accepted less than 100 and declined the rest sampled for him. The next day he selected less than 50 bales, and upon the third day still less. In all, he accepted and marked something more than 100 bales. Most all of the cotton tendered upon these three days, and rejected, was refused upon the contention that it did not come up in staple to the cotton agreed to be delivered.

Cotton began to decline a day or two after this sale was made, and it continued to decline day by day. After the buyers' agent had spent parts of three days in inspecting cotton tendered upon the contract at Birmingham, he refused to inspect more and declared he would receive none; that the seller breached the contract by tendering cotton which was not deliverable in respect to staple; and that his principal

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eled the contract. He was urged to go on with the inspection, and l to go to Decatur, where the seller had other cotton which would ndered. This he absolutely declined to do and declared the con- off. This was on October 6th. The same night the buyers, upon mation from this agent, wired the sellers as follows:

**s Cotton Co., Decatur, Ala:**

**our conduct as to my contract for one thousand bales is unjust, as you know, and is a violation of the contract. I therefore cancel same.**

**"W. P. McBath & Co."**

is wire was received on the morning of October 7th. On Octo- 0th, Mr. Phillips, acting for the sellers, went to office of the buyers told Mr. McBath that he had come for the purpose of tendering the cotton. Mr. McBath said "there was no use in talking about at he was not going to take up the cotton." Mr. McBath substan- agrees by saying that he told Phillips that the agent he had sent rmingham was an experienced man; "that Phillips said, 'Will you nd I will let you receive the cotton,' and I said that, if he did not e with Mr. Whitman, he could not agree with me, and I told him l not have the time to go down there and have another squabble him, and I refused to go with him on those grounds. I was just xious to receive the cotton as he was to tender it." The decline otton by October 6th was $3.40 per bale; the market price in rpool, New York, Memphis, and Birmingham being substantially ame, with allowances for freight.

n October 20th this suit was started by the seller to recover dam- for the breach. There was much evidence upon the question as nether the sale was of any particular staple and whether the staple e cotton tendered at Birmingham and rejected was in this respect ormable to the contract of sale. But Judge McCall, who heard the in the court below, thought this was an immaterial question, and ucted the jury that it made no difference whether the cotton ten- l upon October 6th was deliverable under the contract or not, or her any cotton was then tendered; that the plaintiff had until Oc- 15th to tender and deliver under the contract; and that the can- ion of the contract by the buyer on the 6th of October was unau- zed, and gave the plaintiff the right to recover damages. Ac- ngly the jury was directed to find for the plaintiff the difference een the contract price and the market price on October 6th. There a judgment for $3,400.

ssuming that much of the cotton tendered at Birmingham and re- d was not receivable under the contract, the agent of the plaintiff ror did receive and mark more than 100 bales of that sampled for He was urged to continue his inspection—urged to go to Deca- where part of the cotton was deliverable under the modified agree- . He arbitrarily refused to go on, canceled the contract, and went e. This action his principal ratified in express terms, and when, ne 10th, the buyers were urged to inspect other and further ten- they stood flat upon the cancellation made on October 6th. The ract was not one for the sale of any specific bales of cotton. It l be performed by delivering any 1,000 bales which conformed to

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the trade description of the cotton sold. That a delivery might ha been made on or before October 15th is not disputed. That the bu ers on October 6th absolutely and unconditionally canceled the co tract, and, when urged to inspect further tenders, claimed the right repudiate their obligation, is also conceded. This is defended only u on the ground that the tender made upon the 6th was of cotton whi was not deliverable in performance. But, if this was so, did that c the vender off from making other deliveries at any time, on or befo October 15th, of cotton which was receivable? A seller of chatte who binds himself to deliver within a definite time, cannot excuse hi self for not tendering a delivery when due, unless the buyer, in anti pation, makes the clearest announcement of his repudiation of t agreement and refusal to go on. The refusal must be absolute and u equivocal. Smoot's Case, 15 Wall. 37, 21 L. Ed. 107; Dingley Oler, 117 U. S. 490, 502–503, 6 Sup. Ct. 850, 29 L. Ed. 984. Wh the claim is that one party is relieved from performance by the co duct of the other before the time of performance, we must look to the circumstances to see whether that conduct amounts to an out a out repudiation of the contract and an unequivocal refusal to perfo his part. Michigan Yacht & Power Co., v. Busch (C. C. A.) 143 F 939, 932;[1] Cherry Valley Iron Works v. Florence River Co., Fed. 569, 572, 12 C. C. A. 306; Monarch Cycle Mfg. Co. v. Roy Wheel Co., 105 Fed. 324, 44 C. C. A. 523; Roehm v. Horst, 178 U. 1, 20 Sup. Ct. 780, 44 L. Ed. 953. The rules applicable to an anti patory breach apply as well to one party as to the other. It may that a tender of chattels not receivable may be made in such final a unequivocal terms as to justify the other party in acting upon it as breach and canceling the agreement. But the general rule is that buyer may not reject a delivery of goods conformable to the contra when made in time, merely because there had been a prior offer goods not receivable and rejected upon that ground. Tetley v. Shar 25 Law Times, 658, and Borrowman v. Free, 41 L. R. Q. B. D. 5 are expressly in point.

In Borrowman v. Free, cited above, the facts were that the defen ants agreed to buy of the plaintiffs a cargo of maize. The plainti tendered the cargo of the C., which the defendants refused to a cept. The plaintiffs insisted that the tender was valid. The dispu was referred to an arbitrator, who decided that the tender was inval The plaintiffs then, within the time limited by the contract, tender the cargo of the M. This the defendants refused, upon the grou that they were not bound to accept any cargo in substitution for th of the C. The court held that the defendants were bound to acc the cargo of the M., and that the plaintiffs were entitled to reco damages as for a breach. In Tetley v. Shand, cited above, the pla tiffs tendered, before the expiration of the time for delivery, cott which was not up to the contract. On defendants rejecting same, th before expiration of the time fixed for delivery, tendered other cott which was in accordance with the agreement. Held, that the plainti had not, by the first delivery, broken the contract, so as to justify t defendants in refusing to accept the cotton subsequently tendered.

[1] 75 C. C. A. 109.

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justify a cancellation of a contract for purchase of so many bales ton of a certain type or quality before the time for delivery by the has passed, upon the ground of a tender of cotton not receivable, urpose of the seller to make no other tender and to stand irre- y upon the tender of delivery made must be absolute and unmis- e. There must be no locus penitentiæ. Here there was no stand- the sufficiency of the tender made of bales which had been re- . The buyers' agent was urged to go on and examine other cot- nd to go to Decatur where cotton was deliverable under the modi- greement. Still later the seller showed his purpose not to abide actual tender made, and that he wished to show other cotton. ancellation by the buyer was premature, and the plaintiff below right to maintain its suit for the difference between the contract and the value on October 6th, at which date the defendants below d to absolutely repudiate the contract. It may be that upon the when defendants reaffirmed their repudiation made upon the 6th, on the 15th of the month, the final day for delivery, there een some change in market prices, or some gain or loss over the upon the 6th of October. But the plaintiff had a right to accept pudiation of the contract made upon the 6th in most unequivocal and the defendants cannot complain if the damage is estimated that date. Roehm v. Horst, 178 U. S. 1, 21, 20 Sup. Ct. 780, Ed. 953.

s next said that the plaintiff below, the Jones Cotton Company, n Alabama corporation, which had not complied with the Tennes- atute prescribing the terms upon which foreign corporations may siness within the state, and that the contract for the breach of it sues is an invalid contract, because made by a corporation not rized to do business in Tennessee. Cary-Lombard Lumber Com- v. Thomas, 92 Tenn. 587, 22 S. W. 743; Harris v. Water & Light any, 108 Tenn. 245, 67 S. W. 811. The Jones Cotton Company o warehouse or office in Memphis. They had no cotton there. warehouse and office were in Alabama, and the cotton contracted sold was to be delivered to a carrier in Alabama for delivery in pool or Havre. The sale was through a broker upon a commis- who sold for all who sought his services. It had not domiciled in Tennessee, and was not doing business in that state, within eaning of the statute. The commerce, moreover, was interstate, ot local, commerce. The Tennessee court has limited the Cary- ard Case in Milan Milling Company v. Gorten, 93 Tenn. 590, 27 971, 26 L. R. A. 135, in which case the court said:

> e court, in the Cary-Lombard Case, was not dealing with interestate rce. No such question was presented by the record in that case. On ntrary, it distinctly appeared in evidence that the Cary-Lombard Lum- ompany had an office and lumber yards in the city of Memphis, and ctually engaged in carrying on business in this state. It had acquired and domicile in the state, and was, of course, subject to the regula- of our statute. In the case at bar, the Maish & Gordon Manufac- Company, a foreign corporation, had simply contracted with citizens nessee to furnish certain milling machinery and to adjust it in position mill. This company was in no sense engaged in carrying on its busi- n this state, but was engaged in an act of interstate commerce."

e other errors assigned are without merit. Judgment affirmed.

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(149 Fed. 388.)

BURTON v. TEXAS & P. RY. CO.

(Circuit Court of Appeals, Fifth Circuit. December 31, 1906.)

No. 1,574.

MASTER AND SERVANT—INJURIES TO SERVANT—DEFECTIVE MACHINERY—NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to plaintiff while in the employ of defend railroad company, caused by the blowing out of a plug which had b placed in the crown sheet of a locomotive on the inside of the fire box, idence *held* to require submission of the question of defendant's negligence in inserting the plug, etc., to the jury.

In Error to the Circuit Court of the United States for the West District of Texas.

Geo. E. Wallace and J. A. L. Wolfe, for plaintiff in error.

Geo. Thompson, W. L. Hall, Peyton F. Edwards, Peyton J. wards, and P. R. Price, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Jud

McCORMICK, Circuit Judge. This was an action by the plai in error, E. E. Burton, against the defendant in error, the Texa Pacific Railway Company, to recover damages for personal inju claimed to have been received by him while in the employ of the fendant in error, and proximately caused by its negligence. The a dent was occasioned by the blowing out of one of the plugs which been placed in the crown sheet on the inside of the fire box of engine, whereby steam and boiling water was thrown on the plai and inflicted serious injury on him. When the plaintiff had in duced all of his evidence, the defendant moved the court to giv the jury the general charge for the defendant, which the court th upon did, and there was verdict and judgment in accordance with instruction. The plaintiff brings this writ of error.

We will notice only the (2) error assigned, which is as follows:

"(2) The court erred in instructing a verdict for the defendant and i fusing to submit the question of negligence to the jury, for the reason o preponderance of the evidence introduced showed that the plug which out of said engine was defective, unsafe, and dangerous, and had been properly placed and maintained in the crown sheet of said engine, and known to said defendant, or could have been known by the exercis ordinary care; that defendant was guilty of negligence in the manner way in which said plug had been inserted and maintained, and was also g of negligence in not inspecting said plug and crown sheet and discovering unsafe condition of said plug and repairing said crown sheet by inse a new plug, which said negligence and negligent acts and omissions on part of defendant was a proximate cause of plaintiff's accident and inj

The defendant corporation operates a line of railway from El P Tex., to Toyah, Tex. At the time of the accident plaintiff was w ing as brakeman on what is known as a "dead freight train," w was being pulled by engine No. 257 and was then near a station kn as "Malone." The proof shows that this engine (and numerous o engines used by defendant on that part of its line) was originally

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ed and equipped with brick arches for the protection of flues and appliances therein; that there were four pipes connecting the sheet with the flue sheet, through which pipes steam and water onveyed; that prior to plaintiff's injury this engine (and others) emodelled, and these arches and piper were removed or aban- and the holes or places where the pipes were originally located filled up with plugs which were screwed and fastened into the sheet for the purpose of closing the openings therein made by moval of the pipes and in order to retain water and steam in oiler. The witness Fred Fahrenkamp, who at the time of the , and at the time of the trial, was in the employ of the defend- orporation in the capacity of locomotive fireman, and who had e of the engine No. 257 pulling the dead freight train at the f the injury, testifies that it was one of the plugs that had been one of the holes in the crown sheet above mentioned, that blew nd when it blew out, the door was thrown open and the steam, cinders, and everything else blew out at the door and the ff was badly scalded. At the time the accident happened there two gauges of water in the boiler, which was a safe quantity to that it was one of his important duties to watch the water, keep of water in the boiler, and, at the same time, not to have too At the time of the accident there was between eight and nine of water over the top of the crown sheet, that he was carrying en 195 and 200 pounds of steam, which was a safe head of steam, engines being supposed to carry 200 pounds; that they were run- t the rate of 8 or 10 miles per hour going uphill.

B. Powers, a witness for plaintiff, testified in substance that, in 1904, at the time the injury was received, he was working for efendant railway company as a boiler maker, and that he did work at that time on engine No. 257; that originally there were ipes in the fire box of this engine, which, before he commenced rk for the company in 1901, had been taken out, and the holes ed up with iron plugs by tapping them out, and screwing plugs in d; that almost all of the engines on that division originally had in them which were cut out and the holes plugged up as above oned. There were eight holes—four in the crown sheet, and n the flues; these plugs had to be renewed all along by cutting hreads on the sheet where the pipes came out and putting in lugs. We had to tap the sheet here. By tapping, I mean cut- hreads through the crown sheet and the flue sheet. After cut- hreads in these sheets we used iron plugs with corresponding ls to fill up the holes. When these threads were first cut on there were four and a half threads to the sheet. The sheet is eighths of an inch in thickness and there are 12 threads to the When the plug was screwed in, there were about 4½ threads on lug corresponding to the threads on the sheet. When this en- came back after the accident, I do not know that I examined the ls, because I was in a hurry, working at night, and I and my just retapped the sheets and screwed a new plug in. Of course heet had to have a new thread put in it. I could not tell at that



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time how many threads were in the sheet; I did not count them; I never paid much attention to it. It was in bad shape, and had to be repaired, but I could not say how many threads were there. I never saw the plug, but the sheets had been calked. That is all I know. It had been calked several times, I know. All the evidence there would be of this would be a little ring around the sheet to show where it had been pulling against the plug. Every time you calk it, it would be a little thinner, a litle bit thinner—cut out a little more of it next to the plug. This calking thins the sheet out a little every time and makes it a little thinner. Calking it takes a little of it off and this shortens the threads up. We had to cut new threads in this hole because the plug blew out "and this kinder stripped the threads off." I could not tell whether the boiler plates around that hole was thinned from having been calked one time or more. It might have been made by the first calking, or it might have been made by more calkings. The sheet was thinner than the original sheet fom the calking. The calking made it thinner. I do not know whether it was the first, second, or third calking, but I know it had been calked and was thinner than the original sheet when it was first put on. This crown sheet was originally three-eighths of an inch thick. I would say it was about one-eighth of an inch thinner—just by estimating it.

N. C. Mace, a witness introduced by the plaintiff, testified in substance: I am a boilermaker; foreman of the El Paso Foundry & Machinery Company; have had 11 years' experience; am familiar with the construction and repairing of locomotive boilers, having served my apprenticeship in a locomotive engine shop where they repair locomotive boilers. Since this time I have had 11 years' experience. I am foreman of the boiler department of the shop where I work. My work has been general boiler repairer and the construction of new boilers. From my experience I know the manner and way in which holes in boilers should be plugged or stopped up. I am familiar with the construction of crown sheets and flue sheets connected by pipes for the purpose of supporting brick arches, and know how these pipes are fitted in the boilers. The openings made by the removal of these pipes are usually stopped by tapping the holes, and screwing plugs on the inside of the firebox. By tapping, I mean cut threads in the hole to be filled with the plug. This can be done so as to make the boiler reasonably safe. I would say that if the plug is put in in the proper manner, under ordinary circumstances, it is impossible for it to blow out. If the plug is put in in the proper manner, and kept in proper repair, it is impossible for it to blow out. I know what is meant by calking. I understand that term as applied to boiler making. It is proper when the plug is inserted to calk. This is done by taking the peen of the hammer—that is, the reverse side or round end of the hammer—and tapping around the edge of the plug so as to make it lap over onto the sheet. You tap the plug and not the sheet, for the reason that the blow striking that way on the plug has a tendency to expand it, make it tighter, drive the particles of matter together, and the calking of the sheet would have a tendency to the reverse to a certain extent; that is, it would have a tendency to

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en it up or drive the sheet further from the plug. It would not rge the hole very perceptibly, but the jarring of the hammer on sheet would have a tendency to disturb the mesh of the threads. when a new plug is put in one of these original pipe holes, the who put it in (the boiler maker) should calk the sheet (not the but the sheet) so as to cut off one-third of the sheet—in other ls, make it one-third thinner—in my opinion as a boiler maker that would not have been properly put in; because he has weakened sheet by one-third. Ordinarily, crown sheets are three-eighths inch thick. This is the common thickness of an average locomo- If a plug 2 inches in diameter is placed in the crown sheet of engine carrying 2 (200?) pounds steam pressure, the plug d of course carry 200 pounds to the square inch, and the area of nch plug is 3.1416, or 3⅛, and a little more than 600 pounds of sure carried on that plug. If the crown sheet had been calked so do away with one-third of it, it would be considered reasonably if the calking process had not disturbed the threads, but you l not take away one-third of the sheet without disturbing the ads. So I would say that its efficiency had been lessened by one- l. An engine which is built to carry 200 pounds of steam will onsidered safe until the steam pressure has reached seven times amount carried; in other words, seven is considered the factor of ty in locomotive boilers. It is not considered that a boiler is in ger of eruption until the pressure is seven times what the steam ge registers. After these pipes are removed and the plug is prop- put in, I should not say it would equal the capacity; that is, carry same pressure that a new sheet would. In my opinion that would educed to something like five—the factor. If the plug is prop- put in, it would be reasonably safe. I base this statement on my experience. I have put in numbers of these plugs. During some years of my time, I have had some experience off and on with class of engines that had these pipes, and during this time have in several of these plugs. The more general cause of these plugs ing out is that they begin leaking; the mud gets in around the nes of the threads and has a tendency to destroy them, and as are calked it generally loosens them up and destroys the meshes ne thread. Another reason that may be assigned would be an ex- ive steam pressure, which is very seldom. It might be that the er had been low on the crown sheet and the sheet become heated higher temperature than it would be if the water were on it, and nat case the hole would be expanded and it would allow the meshes he thread to separate with the pressure. I would say that it was possible that 195 pounds of steam on an engine that carries the sure of 200 pounds to blow out one of these plugs, if it was prop- put in and in proper repair.

. H. Gibbs, a witness for the plaintiff, testified in substance, that had been employed as a boiler inspector by railway companies. about nine years' experince working for the Santa Fé, was iliar with the construction of locomotive boilers and the manner hich an inspection of them is made, knows what is understood by

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flue sheets and crown sheets, and is familiar with the manner in wh holes that were left by the removal of pipes are stopped in these cro and flue sheets.

T. J. Maloney, a witness for the plaintiff, testified that he wa machinist, had had 25 years' experience as such, had worked for G. H. Railway Company in El Paso as a machinist and afterwa as foreman. His duties required him to look after the repair of comotives. He had charge of that work. He was familiar with manner in which openings in the crown sheets and the flue sh are closed, and knew how to do that work. These witnesses, Gi and Maloney, were examined fully, and thoroughly cross-examir and their testimony was substantially to the same effect as that the witnesses whose testimony has been recited. As is not unusua such cases, all of these witnesses for the plaintiff were examined able counsel with the ingenuity acquired by veteran experience, some qualification in the shading of the testimony is shown in the r rative of it as given on this acute cross-examination; but the substa of the evidence, we think, is as we have stated it. The rule to termine when the evidence is such as requires that it should be s mitted to the jury to find the facts as to the issue joined by the p ties is so admirably discussed and clearly stated in the case of Grand Trunk Railway v. Ives, 144 U. S. on page 417, 12 Sup. 679, 36 L. Ed. 485, that it has not been departed from or qualifie the many more recent cases, but has been expressly approved, or sumed to be correct in all of them. Some of the language of opinion to which allusion has just been made is the following:

"There is no fixed standard in the law by which a court is enable arbitrarily say in every case what conduct shall be considered reasonable prudent, and what shall constitute ordinary care, under any and all circ stances. The terms "ordinary care," "reasonable prudence" and such terms, as applied to the conduct and affairs of men, have a relative nificance, and cannot be arbitrarily defined. What may be deemed ordi care in one case, may, under different surroundings and circumstances, gross negligence. The policy of the law has relegated the determinatio such questions to the jury, under proper instructions from the court. I their province to note the special circumstances and surroundings of particular case, and then say whether the conduct of the parties in that was such as would be expected of reasonable, prudent men, under a sim state of affairs. When a given state of facts is such that reasonable men fairly differ as to whether there was negligence or not, the determinatio the matter is for the jury. It is only where the facts are such that all rea able men must draw the same conclusion from them, that the ques of negligence is ever considered as one of law for the court."

We deem it unnecessary to cite other authorities. There are ported cases almost without number which have been passed upon courts of last resort, both state and federal, illustrating the appl tion of the rule above announced. A number of such cases have b before us on writ of error, and our views have heretofore been f expressed in the reports of the opinions announcing the decisions this court in such cases. Referring generally to the decisions of Supreme Court of the United States, with which we assume that members of the bar are familiar, and to the decisions of this co with which the members of the bar in this circuit should be famil

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conclude that the trial court in the case now before us erred in drawing the case from the jury by his instructions to them to re- a verdict for the defendant.

herefore, the judgment of the Circuit Court is reversed, and the is remanded to that court, with directions to award plaintiff a new .

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Fed. 393.)

FIRST NAT. GOLD MINING CO. OF NEW YORK & COLORADO v. ALTVATER et al.

(Circuit Court of Appeals, Eighth Circuit. December 5, 1906.)

No. 2,342.

IAL—DIRECTION OF VERDICT.

A question of law arises at the close of the evidence whether there is ny substantial evidence on which a verdict can be sustained in favor of the party producing the evidence, and, if there is no such evidence, it s the duty of the court to direct the jury to return a verdict against them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 339, 376-380.]

INES AND MINERALS—LOCATIONS—ASSESSMENT WORK—PERFORMANCE—EVIDENCE.

In a suit to quiet title to a mining claim, evidence *held* insufficient to establish that the persons under whom defendants claimed title to the ground under a prior location had performed the assessment work required by Rev. St. 1878, § 2324 [U. S. Comp. St. 1901, p. 1426], so as to hold the ground against plaintiff's subsequent location.

Error to the Circuit Court of the United States for the District olorado.

. Riddell and E. W. Hurlbut, for plaintiff in error.

illiam H. Bryant (Charles S. Thomas and William P. Malburn, he brief), for defendants in error.

efore SANBORN and VAN DEVANTER, Circuit Judges, and LIPS, District Judge.

HILIPS, District Judge. The plaintiff in error, the First Na- l Gold Mining Company of New York and Colorado, in 1901 application to the General Land Office of the United States for tent on what is known as the "Burroughs Lode," embracing a ber of alleged contiguous mines hitherto known as the "Garrison," Vanderen," the "Beverly," the "Ford," the "Farmer," and on the of said group the "Garrison," the latter embracing 233⅔ feet ngth and 50 feet in width. The said mines had been located, per- , as early as 1859. The First National Gold Mining Company s to have acquired said mining claims prior to 1889. There was cord evidence of the title to the said Vanderen, Beverly, Ford, and ner claims beyond a prior occupancy by the plaintiff in error and redecessors. Said application for a patent was adversed by John r, Joseph Updegraff, and Martin Lawler, who are represented in litigation by their respective administrator and administratrix. said John Clear in his lifetime became the assignee of the prop-

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erty in controversy under a location made thereon August 20, 1891, known as the "John Clear" location, August 20, 1891. Conformably to the provisions of section 2326, Rev. St. [U. S. Comp. St. 1901, p. 1430], the adversing claimants instituted this action to determine the rights of the respective claimants to the premises.

The statute applicable to the situation (section 2324, Rev. St. U. S. 1878 [U. S. Comp. St. 1901, p. 1426]) declares that:

"On all claims located prior to the tenth day of May, 1872, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, 1874, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to re-location in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

The contentions made in the pleadings on behalf of the plaintiffs below are (1) that when said Clear made his discovery location and sunk his shaft in August, 1891, the premises were public domain, subject to entry, because the defendant below had not done the required amount of assessment work thereon for the years 1890 and 1891; and (2) that even if the defendant below did any such work, it was at the easterly end of the entire strip of ground, and as it had not shown any title to the 200 feet embracing the said Vanderen, Beverly, Ford, and Farmer claims, of 200 feet in length, the assessment work done on the strip east thereof could not be regarded as sufficient to preserve the other claims. At the conclusion of the evidence the court directed a verdict for the plaintiffs below.

As the ground in controversy, where Clear and others made their alleged discovery shaft in August, 1891, had never been patented, it was subject to location if there had not been done the required amount of work thereon for the year 1890 by the applicant for the patent. Lawler and Updegraff having died before the hearing, their testimony is absent. There is no claim made that the defendant below did any assessment work in 1891 before the location of the Clear lode, but it is claimed that the required assessment work was done in 1890 on the 183-foot strip in the shafts and drifts thereon, known as the Gould Shaft. The substance of the testimony on behalf of the plaintiffs below was as follows: Said Clear testified that he had lived for many years in the immediate vicinity of the Burroughs lode, and had known it for many years; it was about 400 feet from where he lived. He saw no work done thereon in 1890, although he worked on the Camp Grove mine, 300 or 400 feet away, for three months in 1890; that in passing from the Camp Grove to his home he went within about 300 feet of the Burroughs mine; that he worked on the Kansas lode about 150 feet therefrom; that nobody did any work on the Burroughs lode to his knowledge; that he saw the Gould shaft on that part of the Burroughs lode every day in the week from his boarding house, and did not see anybody about the Gould shaft in 1890, and that he did not believe that any one could have been working there without his seeing them.

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ırvey Henry, who had lived near this place since 1865, who was an ıeer and miner, testified that he knew the premises ever since he there, and that he worked on the Camp Grove in 1890; that to est of his knowledge no work was done on the Burroughs in that ; that he would have seen the work had it been done because he working right there close to it always. The Camp Grove claim 450 or 500 feet away; that he worked as an engineer on that claim, h kept him on the surface and in plain view of the Burroughs; he worked on the Camp Grove claim during the last eight months e year, but lived in Nevadaville, close by, right along. He was ied that no work was done on the Burroughs for the year 1890, ıse he was passing back and forth all the time; that there was ly a day but that he passed around the mine somewhere; that he ed on the Phœnix a few days, and that the parties could not worked on the Burroughs during the first part of 1890 without seeing them; that if anyone had worked there he must have known He testified that he knew the witnesses of the defendant below, am Williams and Arthur Lugg, and he knew Matthews in his me, and that if these men had been working up there the first or four months of 1890 he must have known it.

nes Williams, a miner, knew the Burroughs lode about 20 years. 390 he worked on the Leavenworth, about a mile from the Burhs, and passed within 600 or 700 feet of the property every day, lid not know of any work having been done thereon in 1890, and he would have known it if it had been done. The ground he ed on was west of the Burroughs lode, about 350 feet west of Clear Discovery shaft. Did not see anybody working in the d shaft; that if anybody had been working there in the spring 90 he would have known it because he knew where the men in the ment worked. He knew Williams, Lugg, and Matthews. They ıot work in the Gould shaft in 1890. In that year they worked e shaft 78 feet west of the Ophir shaft, 108 feet east of the Gould ıment, off of the ground in controversy. That he walked by the where Williams and others were working twice a day in 1889 1890. This testimony is not obnoxious to the criticism that it is ive in character. As to whether the locator has done the necesamount of assessment work to entitle him to hold his claim, when sted, the evidence of the assessment necessarily is more or less rm negative. The witnesses ordinarily can only testify that they ot see the work done. The value of their testimony is conditioned their opportunities for observation and their relation to the situs e mine, so as to enable them to see it and to say whether it was ıble that they would have observed such a physical fact as the ing of the mine had it been done before their eyes. These wits were miners. From the very habits of their vocation they would notice of the presence of their fellows engaged in such work withe range of their vision, where they were daily passing, doike work in close proximity. It is a noteworthy fact that and others who lived in the immediate vicinity of this mining , familiar with it many years prior to 1890, passing by it during

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that year, should in 1891 express their confident assurance in its be public domain, based upon the absence of any work having been d on the ground in 1890, by entering thereon and making the locat shaft.

To meet this persuasive proof, the defendant below introduced W liam Williams, who testified that he was living in that vicinity in 1 and 1890 and knew the Burroughs lode and the Gould shaft, and wo ed in the shaft in 1889 and a part of 1890; that he was working ab 100 feet down in the shaft; that he was working under a lease fr Messenger, who was defendant's agent; that Matthews was interes in the lease with him and Arthur Lugg drove the whip; that he thou they did $200 or $300 worth of work in the shaft. Matthews is de The cross-examination of this witness demonstrated beyond any r sonable contestation that if he worked there at all it was in 1889. statements were so confused and contradictory as to destroy the ef of his testimony as to his work there in 1890. The cross-examinat further developed the fact that he had for some time been out of country where this mine was located, and was living at Idaho Sprin He could not tell the year he left the locality of the mine. It furt developed the suggestive fact that W. C. Matthews, brother of Thor Matthews, who seems to have been acting in behalf of the defend below, hunted up this witness at Idaho Springs, who, though he never worked on the premises, had refreshed the witness Willia mind as to the circumstances. In response to the question: "Will swear you ever struck a pick in that ground in 1890?" He answer "No, sir, I won't."

"Q. Don't you know that you didn't? A. I don't believe I did. Q. Now, are certain, aren't you, that you began to work in the spring of 1889. worked about two months? A. Worked two or three months. Q. You are certain you went back there about three months later and then went to w again and worked about three months? A. Yes, sir. Q. Never worked t after that, did you? A. No, sir."

When inquired of, if as a matter of fact he had not forgotten about the matter when William Matthews came to see him, this qu tion was asked him:

"If he hadn't come to see you you would have never remembered anyt more about it? A. Yes, sir."

Arthur Lugg, a witness for the defendant, testified that he livec Nevadaville, which is near the Gould shaft, until he was about 15 ye old; that he knew the Gould shaft, and worked there one Satur driving the whip horse (used for hoisting) when he was 13 years c that being 13 years before the trial. This witness was also approac by said William Matthews, who asked him if he did not work for T and William, and he said, "Yes."

The last witness for defendant below was Mrs. Eliza Matthe widow of the man who is alleged to have done the work. She testi that she remembered her husband to have worked there in 1890 account of the birth of her son; but she testified that he worked al there that year, and that Williams worked with him the previous ye and she also put the boy Lugg there with him in 1889. It was furt

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developed on cross-examination that from the time of the alleged work to a few days previous to the trial she had never thought of the matter; and she said her husband never worked there after September, 1890, and when confronted with his affidavit to his having done work there in 1893, she admitted that she did not remember dates, because she never interested herself with the mining at all. If she is to be credited the other two cannot be, since she testified to work done by her husband along in 1890, and she is the only one who does so testify. In this she is flatly contradicted by three witnesses, to say nothing of the remarkable circumstance of a man working unaided in a mine 100 feet below the ground.

Judge Riner, who presided at this trial, after the argument on the motion for an instructed verdict, said:

"I have watched this testimony with a good deal of care. My own view is that you have not shown the amount of assessment work over there to entitle you to that. As to the work you did in the Gould shaft, you bring in here a woman who testified her husband worked there a certain time, and a boy who said he worked there one Saturday driving a horse; and against this testimony we have the testimony of Mr. Williams, who testified that he passed there every day. I think the plaintiff has the preponderance of the evidence as against you, so that I am inclined to grant the instruction. I do not think the testimony showing the amount of your assessment work is at all satisfactory; it would not be to me, and I think it fails in that, so far that it brings the case within the rule that obtains in this court, viz.: When the court is satisfied that the verdict should be but one way, it is its bounden duty to instruct that way. I think the preponderance of the evidence is in favor of the plaintiff's contention that you did not do the assessment work."

No right-minded, self-asserting judge, with a proper sense of duty, will permit a judgment, subject to his supervisory control, to be entered which his intelligent conviction advises him is unsustained by sufficient evidence. While abstaining from an undue assumption of the province of the jury to determine where the truth lies in conflicting evidence, and the reasonable inferences to be drawn therefrom, as said by Mr. Justice Brewer, in Patton v. Texas & Pacific Ry. Co., 179 U. S. 660, 21 Sup. Ct. 275, 45 L. Ed. 361:

"The judge is primarily responsible for the just outcome of the trial. * * * He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment."

In Cudahy Packing Company v. Marcan, 106 Fed. 645, 45 C. C. A. 575, 54 L. R. A. 258, the syllabus prepared by the court lays down the proposition that:

"At the close of the evidence there is always a preliminary question for the judge before the case can be properly submitted to the jury, and that is whether or not there is any substantial evidence upon which the jury can properly return a verdict in favor of the party who produces it, and, if there is no such evidence, it is the duty of the court to direct the jury to return a verdict against him."

Conceding that, under the pleadings, the burden was upon the plaintiff below to show the failure of the defendant below to perform the essential work on the claim in question for the year 1890, we are satisfied

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from an examination of all the evidence that the trial court was w ranted in directing a verdict for the plaintiffs. In view of this con sion, it is unnecessary to consider other questions raised in the assi ment of errors.

The judgment of the Circuit Court is affirmed.

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(149 Fed. 898.)

TOLEDO, ST. L. & W. R. CO. v. CONNOLLY.

(Circuit Court of Appeals, Sixth Circuit. January 8, 1907.)

No. 1,553.

1. RAILROADS—INJURIES TO LICENSEES—NEGLIGENCE—QUESTION FOR JURY.

In an action against a railroad company for killing the superinten of a milling company by crushing him between certain cars and a woo spout or chute through which grain was loaded from the mill into cars, evidence *held* to require submission to the jury of the questio defendant's negligence in backing the cars onto the switch without no to decedent.

2. TRIAL—INSTRUCTIONS—CREDIBILITY OF WITNESSES.

An instruction that a witness might be contradicted, not simply b witness swearing to the opposite, but by the improbability of his st and by anything, either in the testimony as given or in the circumsta of the case presented, which in the judgment of the jury tended to credit the witness' statements, the jury being required to ascertain truth by the exercise of common sense, etc., was proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 531-

3. DEATH—ACTIONS—PARTIES—BENEFICIARIES.

Under the Ohio wrongful death act, providing that the recovery be for the exclusive benefit of the wife or husband, and children, there be neither of them, then of the parents and next of kin of the pe whose death shall be so caused, the recovery to be apportioned among beneficiaries with reference to their age and condition and the laws o scent and distribution of personal estates left by persons dying intes where decedent died leaving a father and mother and brothers and sis the action was properly brought for their joint benefit, and not for the efit of decedent's next of kin, excluding his parents, though on deced death his personal estate would have passed to his brothers and sis and not to his father and mother, as provided by Ohio Rev. St. 190 4153, 4159.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, §§ 47,

In Error to the Circuit Court of the United States for the West Division of the Northern District of Ohio.

C. A. Schmettau, for plaintiff in error.

James M. and Walter F. Brown, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Jud

RICHARDS, Circuit Judge. This suit was brought to recover d ages for the death of Patrick Duffy through the wrongful act, neg and default of the Toledo, St. Louis & Western Railroad Comp There was a verdict and judgment for the plaintiff below which

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oad company seeks to have reversed principally on the ground that court should have given certain directions in its favor.

he accident occurred on January 26, 1904, on a switch of the rail- l company adjacent to the mill of the Miami Maize Company. Duf- vas a foreman of the Maize Company in charge of the loading and oading of cars. At the time of the accident, a car was being led by a gang of men under control of Duffy. This car stood on switch next to the mill and was being loaded by the use of a wood- spout or chute extending from the mill into the car through its r. Standing on the switch about five feet to the west of this car, a string of three empty cars on which the brakes were not set. re was a downgrade from the main track to the mill on this side ne switch. While Duffy was standing in the door of the car, direct- his gang of five or six men, two box cars, coupled together and in rge of a brakeman, were kicked down upon the switch by the engine switching crew in charge of Conductor Turner. The cars, when off from the engine, were thrown into the switch with such force the brakeman failed to stop them; they struck the three empty s, forced them violently against the car being loaded, and Duffy caught between the side of the door and the wooden spout and ed. The negligence charged against the railroad company was, t, in not giving Duffy notice that the two cars were about to be ked down upon the Maize Company's switch; second, in failing set the brakes on the stationary cars; third, in throwing the two s, detached from the engine, upon the switch with such force that y could not be controlled; fourth, in failing to provide a proper sufficient brake on one of the two cars thrown in, so they could stopped in time; and, fifth, in not stopping these two cars in time, negligently permitting them to collide with the cars standing on the tch.

'he principal contention was with respect to the claim of negligence failing to give Duffy notice that the two cars were about to be own in upon the switch. The railroad company contended it had blished by the uncontradicted testimony of Conductor Turner, sup- ted by his assistant Smith, that notice was given Duffy, and the rt was requested, for that reason, to give certain charges which uld have required the jury to dispose of this claim in favor of the road company. The court refused to do this. Notwithstanding the orous argument of counsel for the railroad company, we think the rt below took the proper view of this matter in leaving to the jury decision of the disputed question of fact involved. Counsel as- ned that because Turner, supported by Smith, testified that Duffy, ne 20 minutes before the accident, gave him a list of the cars to be en from and the cars to be put upon the Maize Company's switch, ing, "Come right away, just as soon as you can," and he replied l right, Pat, I will be there right away," that all the notice required been given, and since there was no witness to contradict this tement, Duffy being dead, it must be accepted as the truth, and this m of negligence eliminated. The court was asked to charge that

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"while the jury are the judges of the credibility of the witnesses, y
the jury has no right to disregard the uncontradicted testimony of
witness whose credibility and veracity are unimpeached." This t
court gave as correct in the abstract, but, applying it to the case
hand, reminded the jury that a witness might be contradicted, n
simply by a witness swearing to the opposite, but by the improbabil
of his story, and by anything, either in the testimony as given or in t
circumstances of the case presented, which in the judgment of t
jury, tended to discredit his statements. "Common sense," said t
court below, "is to be applied here as everywhere; and no techni
rule of law harnesses your judgment or controls your common sen
view of what is the truth, when it comes from the witness stand. Y
are the judges of that."

We find nothing to criticise, but something to admire, in the lu
definition given by the court of the word "contradicted" as applied
testimony given in the course of the trial; and we think the co
was justified in view of the argument of counsel for the railroad co
pany, in saying to the jury that the fact that Duffy, after his conv
sation with Turner, immediately put himself in a place of great dang
where he met his death, might be treated by the jury as a circumstan
contradicting Turner's statement that he was notified they were goi
to throw the cars in upon the switch at once. A number of witnes
testified to the custom of the railroad company to notify Duffy or o
of his men, whenever it was about to kick cars in upon the Maize Co
pany's switch, so that, if a car was being loaded, the spout, might
removed and the men look out for themselves. Whether this cust
existed, whether ordinary care required its observance, and whet
any notice in compliance with it was given just prior to the time of
accident, were all questions which were properly submitted to the ju
We are clearly of the opinion that the court would not have been j
tified in taking this case, or the part to which we have alluded, fr
the jury.

Duffy left a father and mother and some brothers and sisters, an
is submitted that no testimony as to the condition of his father a
mother, and the help he had been in the habit of giving them, sho
have been admitted, because, under the statutes of descent and d
tribution of Ohio, his personal estate would have passed to his broth
and sisters and not to his father and mother. Rev. St. Ohio, 1906,
4153, 4159. But the Ohio statute regulating the action for injury
wrongful death, provides that it shall be "for the exclusive benefit
the wife, or husband, and children, or if there be neither of them, th
of the parents and next of kin of the person whose death shall be
caused." This action was properly brought for the benefit of the p
ents and next of kin of Duffy. The subsequent provision that
amount recovered "shall be apportioned among the beneficiaries, unl
adjusted between themselves, by the court making the appointment
such manner as shall be fair and equitable, having reference to the a
and condition of such beneficiaries and the laws of descent and dis
bution of personal estates, left by persons dying intestate," did

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this an action simply for the benefit of the next of kin, exclud-
he parents. While the laws of descent and distribution of per-
estates are to be considered by the court making the apportion-
the distribution is not to be made strictly in accordance with
laws, for the court is also required to consider the age and condi-
of the beneficiaries, a thing not taken into account in the laws of
nt and distribution. Rev. St. Ohio, 1906, § 6135.
e judgment is affirmed.

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Fed. 401.)

## DADY v. BACON.

(Circuit Court of Appeals, Second Circuit. December 4, 1906.)

No. 45.

GE—SINKING OF TOW—LIABILITY OF TOWING VESSEL.

A steamship *held* not in fault for the sinking of a barge which she was owing on one of her regular trips from New York to Cuba, because of her eeping up her regular speed until the barge was found to be in distress, here the weather was fair, and the sinking resulted from the unsea-orthiness of the barge for such a voyage due to her age and structural eakness, which condition was not known to the master of the steamship or apparent; he having the right to rely on the assumption that her wner considered her fit for the voyage when he contracted for the tow-ge, knowing that the steamship was required to make schedule time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Towage, §§ 11, 4, 25.]

peal from the District Court of the United States for the South-District of New York.

r opinion below see 133 Fed. 986.

is cause comes here upon cross-appeals from a decree of the Dis-Court, Southern District of New York, holding the respondent, was operating the S. S. Vimeira under a time charter, liable for alf the damages sustained by libelant by reason of the sinking otal loss of his barge James L. Ogden and her cargo.

ter S. Carter, for libelant.

S. Haight, for appellee.

fore LACOMBE, TOWNSEND, and COXE, Circuit Judges.

ACOMBE, Circuit Judge. The steamship with the barge in tow hawser, started from New York about 4 a. m. on June 3, 1902, d for Cardenas, Cuba, and laid her course for Cape Hatteras. following excerpt from the opinion of the district judge accurately forth the circumstances attending the sinking:

e weather was fine [at the start] and continued so until the end. The ship's usual speed was from 8 to 9 knots. During the day she made 7 knots. Up to about 8 o'clock p. m. so far as the steamship was ad-nothing unusual occurred on the barge, although she was sheering

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badly owing to her lack of a rudder, but at that time a signal was displayed to the steamship asking her to proceed slowly. The steamship complied with the request and during the night went at the rate of about 2 knots. There is a conflict between the witnesses from the barge as to her condition at this time, one of three men on board testifying that there were then two feet of water in the hold, and another that the barge was not then leaking seriously. I am inclined to believe the former. There is no dispute between the two witnesses, who have been examined of those on board, that after the signal she leaked badly. During the night, one of her two pumps became choked and useless. By pumping all night with the other she was kept afloat, but when day broke on the morning of the fourth a sign was displayed on the barge, that she would not float more than two or three hours and the men were then taken off by a boat from the steamship. At this time the tow was opposite a point on the coast about half way between the Delaware and Chesapeake Bays. The master of the steamship so estimated, and that they were then about 50 miles from the coast and about 90 miles from Cape Henry. Under the circumstances, he did not feel bound to deviate from his course, especially as the appearance of the barge indicated that it was not probable she would last much longer, though in fact she did not sink for 8 or 10 hours. If that could have been known at the time, it does not seem that it would have made much difference, as it is doubtful if in view of her position, she could have been saved in any event. Her distance from the coast and the nearest point of refuge was such that going at the slow rate of speed she was obliged to use under the circumstances, she was practically without reasonable hope of reaching harbor, after she became partially filled with water."

The barge was an old one, built in 1864, and although she had been repaired and was no doubt fit for ordinary towing, she was in no condition structurally to withstand the strain of a long sea voyage, without a rudder, in tow of a steamship of a regular line, which was running on schedule time and had to keep up to a speed of 7 knots in order not to fall behind it, or incur liability for delay to the shippers of her cargo. She was, as the District Judge found, unseaworthy in the sense of not being in a fit condition to tow safely on the voyage which she entered upon.

The claim made in the libel, and on which libelant relied upon the trial was that there was a special contract that instead of laying the usual and direct course for Cardenas the steamship would keep along the coast, so as to be within 10 or 15 miles of shore and therefore, in a case of disaster much nearer to a port of refuge than she would be on her regular course and to tow at a lower rate of speed. On the argument, it was further contended that, even without a special contract, she should have followed the coast line as a safer course with a barge in tow. There was a sharp conflict of testimony as to what took place when the contract was made; on the part of the libelant evidence was put in tending to show such a contract; on the part of the respondent there was proof that such a contract was asked for but that it was refused, that libelant's agent was told the Vimeira would not follow the coast, and that her speed would not be reduced because she was running on a regular line, and because the sum offered for towing the barge was not sufficient to warrant her going at any less speed than ordinary—8½ to 9 knots. The District Judge heard and saw the witnesses, and found against the libelant on this branch of the case. He says:

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f the contract was as contended for by the libelant, the respondent would e incurred a liability for expenses considerably in excess of the towage rns. The improbability of such a contract being made in connection with testimony satisfies me that the respondent's version of what occurred be-en the parties should be accepted."

Ve fully concur in this conclusion. The libelant, therefore, took chances as he had the right to do if he so elected, of whatever in-ased risk there was in towing 40 or 50 miles from the coast at the ed which the Vimeira maintained, until advised of disaster, viz., nots.

'he District Judge held the respondent in fault because, although advised of the structural unseaworthiness of the barge, the master he Vimeira nevertheless could see enough about her to inform him : she was not in fit condition to tow at that rate of speed, and uld therefore have reduced it. Two circumstances are relied upon:

1) Her freeboard. There is some dispute as to what this was; witness says 2 feet amidships and 4 to 4½ feet at the bow, an-er makes it between 5 and 6 feet at the bow and a foot and a half aft. Moreover there was a bulkhead built across the bow to ow the water off when it struck her. Whatever was her actual eboard it was amply sufficient for towing at 7 knots down to the e when signal was made and the speed reduced. The weather fine and during her course down to the time when she was found e making water—as the respondent's own witness testified "she e beautifully in the sea * * * there was no washing at all r her, she acted beautiful that way." There seems to have been ing in her freeboard to call for reduction of speed during that iod.

2) The absence of a rudder. Before starting the respondent had rudder removed, apparently because it would be difficult to handle n a heavy sea. In consequence, it was apparent that she would tinually sheer from side to side and thus be exposed to greater in. Because she had no rudder, the pilot who took the Vimeira n through the harbor refused to tow her, and she was brought n to the Lightship by a tug. That, however, was because of the age she might do to other craft which would have to be encoun-ed in a crowded harbor. In the open ocean with plenty of sea m the situation would be different. She was not heavily laden and do not find sufficient in the evidence to warrant the conclusion : a sound, well-built craft might not be expected to withstand the ed strain of towing without a rudder without incurring any par-lar risk. She was not in fact sufficiently sound in structure to d that strain, but there was nothing in her appearance to convey : information to the master of the steamer, who knew she was ned over to him to tow through the open ocean at his ordinary ed. He was entitled to rely on the assumption that her owner, who w her internal structure and condition, considered her fit to set on such a voyage, and until something occurred to indicate that h assumption was unsound, was entitled to rely upon it. The Dis-

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trict Judge, in our opinion, gave too much consideration to a rema of the master upon cross-examination that he considered "one kn was too great a speed to tow that barge." This is wisdom after t event, and manifestly an exaggerated form of expression epitomizi his general disgust at the complete break down which occurred witho any untoward condition of wind or sea. He says that he did not thi her "all right" to tow when she was given to him, but his testimo shows that what he meant was that he considered it a "very fooli idea" to tow without a rudder.

In our opinion, no fault is proved against the steamer. The dec is reversed, with costs, and cause remitted, with instructions to dec in accordance with this opinion.

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(149 Fed. 404.)

PENNSYLVANIA R. CO. v. McCAFFREY et ux.

(Circuit Court of Appeals, Third Circuit. January 14, 1907.)

No. 27.

1. CARRIERS—INJURIES TO PASSENGERS—BURDEN OF PROOF.

In an action against a carrier for injuries to a passenger, the burden proof of negligence is on the plaintiff, and cannot be shifted to the fendant without showing that the injury in question was caused by so person or thing connected with the carrier's railroad or business transportation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 12 1294.]

2. SAME—EVIDENCE.

In an action for injuries to a passenger by a missile coming through open car window, plaintiff's evidence was that the missile entered thro an open window on the side next to a passing freight train, that it wa bolt with a nut on the end of it, and that such bolts were largely u in constructing ordinary freight cars, while, on the other hand, there evidence that the missile was thrown through an open window on the posite side of the car by one of several boys who were pelting the tr as it went by them. *Held*, that the evidence as to whether the mis came from a source for which the carrier was responsible was insuffici to justify a verdict against it, and that a verdict should, therefore, h been directed in its favor.

In Error to Circuit Court of the United States for the District New Jersey.

James B. Vredenburgh, for plaintiff in error.
Edwin F. Smith, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judg

DALLAS, Circuit Judge. In this opinion the parties to the ca will be referred to in accordance with their respective positions the court below, where Mr. and Mrs. McCaffrey were the plainti and the Pennsylvania Railroad Company was the defendant.

While the plaintiffs were passengers in one of the cars of a tr

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ated by the defendant, Mrs. McCaffrey was struck by something h entered the car from the outside, and the defendant was averred liable for the injury thus caused to her, because, as was alleged, arelessly, negligently and improperly allowed certain of its rolling to become so out of repair and unsafe, and so carelessly, negli- y, and unskillfully operated, managed and controlled its said oad and the appurtenances thereto, and in particular a certain train of cars consisting of box or freight cars, drawn by a notive upon the track next northerly to the track whereon was rain of passenger cars in which the said plaintiff, Mary B. Mc- ey, was, that the said plaintiff, Mary B. McCaffrey, without any e or warning to her given, and without any fault or negligence er part, was struck upon the head by a bolt, bar, or other piece of or steel, coming loose and separated from one of said box or ht cars (the same being then and there unsafe and out of re- ." The plea was the general issue, and at the close of the trial court, though requested, refused to direct a verdict for the de- ant. This refusal, amongst other things, is here assigned for .

is unquestionably true, as in substance was averred, that the ndant owed to Mrs. McCaffrey the duty to see to it that, while vas a passenger upon its train, no harm would come to her through negligence in the operation or management of its railroad or of appurtenances thereto, including "the certain other train of cars" red to in the above extract from the declaration. But, except as nst its negligence or that of its servants, the defendant did not, by oting Mrs. McCaffrey as a passenger, become an insurer of her y. The gravamen of her complaint—the gist of her cause of n—was negligence. She necessarily alleged that her injury was ed by lack of due care, and evidence of negligence, or of some fact rcumstance justifying the assumption of its existence, was there- indispensable. The burden of proof in all such cases rests at upon the plaintiff, and, even in the case of a passenger, it cannot hifted to the defendant, without showing that the injury in ques- was caused by some person or thing connected with its railroad usiness of transportation. Hence it was that the plaintiffs in the ent case endeavored to maintain their special allegation that the which struck Mrs. McCaffrey had come "loose and separated" one of the cars of a passing train, and, if the evidence they ad- d had been sufficient to warrant a finding that such was the fact, ing more, at the outset, could have been required of them, for such a finding, if made, a presumption of negligence would have n, which, unless and until rebutted, would have been conclusive. n, however, the learned judge was asked to direct a verdict for defendant, the taking of testimony had been concluded, and the tion then presented was whether, upon all the evidence, the ntiffs' hypothesis as to the source of the offending missile could onably be adopted, and we think this question should have been atively determined. There was no direct testimony as to where



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it came from, nor was there any proof from which, in our opinion, nature and origin could be legitimately inferred. The evidence on l half of the plaintiffs was, in effect, that it entered through an op window on the side next to the passing freight train, that it was bolt with a nut on the end of it, and that such bolts were largely us in constructing ordinary freight cars; whilst, on the other hand, the was evidence tending to show that the harm-inflicting thing, whatev it may have been, was thrown through an open window on the o posite side of the car, by some one of several boys, who, as was testifi were pelting the train as it went by them.

Upon this state of the proofs the defendant's request for bindi instructions should not have been denied. Undoubtedly, it commo is within the province of the jury to decide an issue as to negligen by drawing the reasonable inference from the primary facts. I reasonable inference is one thing, and mere guess or arbitrary s mise is another and very different thing, and though it may be t the evidence for the plaintiffs, if alone considered, would have w ranted a suspicion that in some way or other the moving freight tr was responsible for Mrs. McCaffrey's hurt, yet it is plain that, fr the evidence as a whole, no more explicit deduction could have b properly made than that the missile which struck her came either fr that train or from one of the boys that have been referred to. T jury, however, was allowed to conjecture that it came from the tra and upon that conjecture merely to base the further finding, also inferential, though a legal, one, that the defendant had been gu of negligence.

We think this should have been prevented by granting the fendant's request for a directed verdict, and therefore the judgment the Circuit Court is reversed.

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(149 Fed. 406.)

## MORRIS v. DUNBAR.

(Circuit Court of Appeals, Third Circuit. January 3, 1907.)

No. 47.

WRIT OF ERROR—FINAL JUDGMENT.

Defendant filed a general demurrer to plaintiff's statement or decla tion, which demurrer was sustained with leave to the plaintiff "to disc tinue on payment of costs," but it did not appear that there had ever b a discontinuance, or that defendant had ever entered judgment agai plaintiff prior to the suing out of the writ of error. *Held*, that the or was not such a final judgment as would support the writ.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Erro 465.]

In Error to the Circuit Court of the United States for the West District of Pennsylvania.

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C. Barton, for plaintiff in error.
n N. Dunn and A. S. Moorhead, for defendant in error.

ore DALLAS and GRAY, Circuit Judges, and LANNING, ct Judge.

NNING, District Judge. The record submitted to us in this shows that the defendant filed a general demurrer to the plain- statement, or declaration. After argument of the demurrer, as rs by the opinion brought up with the record, the court concluded he demurrer should be sustained, and added that "the plaintiff ave leave to discontinue on payment of costs." A writ of error tes only on a record in which a final judgment has been entered, he only final judgment that could have been entered against the iff on this demurrer was a judgment nil capiat, or its equivalent. hbold's Practice (12th Ed.) 934; Tidd's Practical Forms (8th 250; United States v. Leverich (D. C.) 9 Fed. 481; Gould v. sville, etc., R. R. Co., 91 U. S. 526, 527, 23 L. Ed. 416; Cole oden, 18 N. J. Law, 15, 20. It is a common practice, however, a demurrer is sustained, to enter an interlocutory order in favor e demurrant, and to allow the defeated party an opportunity to l or to plead over. Alley v. Nott, 111 U. S., 472, 474, 4 Sup. Ct. 28 L. Ed. 491. In this case, instead of allowing the plaintiff to l his statement, or declaration, the court stated that he might ntinue. Whether he entered an order of discontinuance does not r. Neither does it appear whether the defendant has entered any nent against the plaintiff.

e result is that we are compelled to dismiss the writ of error. But e defendant has argued only the points presented by the assign- of errors, and has not moved to dismiss the writ, no costs will be ed.

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ed. 407.)

## In re DIAMOND.

(Circuit Court of Appeals, Second Circuit. December 4, 1906.)

No. 44.

NKRUPTCY—COURT OF BANKRUPTCY—POWER TO AMEND PRIOR ORDERS.

A court of bankruptcy has power to amend an order of discharge at y time before the proceedings in the case have been closed provided such nendment will not affect vested rights.

IE—DISCHARGE—PARTNERSHIP DEBTS.

Partnership creditors may prove their claims against the estate of a nkrupt partner, although entitled to share only in the surplus of his tate after his individual creditors have been paid, and where their debts ve been scheduled, and they have had due notice of the proceedings, the nkrupt is entitled to a discharge from such debts as well as his individ- al debts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 778.]

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Petition to Review Order of the District Court of the United St for the Southern District of New York.

**This cause comes here upon petition to review an order made by District Court, Southern District of New York, amending the order o judication and petition and order for discharge, so as to discharge the b rupt from his debts as member of a partnership, as well as from hi dividual debts. The original schedule enumerated all the firm creditors, had due notice of all proceedings.**

Sol. J. Frendenheim, for petitioner.
E. J. Myers, for respondent.

Before LACOMBE, TOWNSEND, and COXE, Circuit Jud

PER CURIAM. The amendments were such as the District C had power to make, and the case seems a proper one for the gran of the relief prayed for. See In re Kaufman (D. C.) 136 Fed. in the conclusion and reasoning of which we fully concur. The tioning creditor contends that the case cited was erroneously dec because it held that firm creditors might present their claims ag the individual bankrupt, whereas this court in Re Janes, 133 Fed. 67 C. C. A. 216 held that "such proof could not be made." Th a misreading of our decision in the Janes Case. We did not that such claims might not be made—indeed section 5f, Bankr. July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3 evidently contemplates that they may be made—but only that creditors of a partnership and creditors of an individual member t of had proved their claims, they should not all share alike in the vidual estate, that the individual creditors should first be paid from individual estate, and that it was the surplus only, if any there after such payment, which could be marshaled for distribution to firm creditors.

The order is affirmed.

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**(149 Fed. 408.)**

**WELLS & RICHARDSON CO. v. ABRAHAM et al.**

**(Circuit Court of Appeals, Second Circuit. November 19, 1906.)**

**No. 173.**

**INJUNCTION—GROUNDS—INDUCING BREACH OF CONTRACTS.**

**An order granting a preliminary injunction restraining defendants inducing complainant's customers to violate their contracts by selli proprietary medicine manufactured by complainant to defendants, con to the terms of their said contracts, considered, and affirmed.**

**Wallace, Circuit Judge, dissenting.**

Appeal from the Circuit Court of the United States for the Eas District of New York.

For opinion below, see 146 Fed. 190.

E. E. Wise, for appellants.
F. S. Reed, for appellee.

Before WALLACE, TOWNSEND, and COXE, Circuit Jud

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ER CURIAM. The assignments of error do not require us to de- whether the terms of the injunction are broader than the case rants. The fifteenth assignment is the only one directed to the t, and does not specify any particulars in which the terms are too d. For reasons stated on the argument, we are of the opinion that are not authorized to pass upon the question of jurisdiction pre- ed.

pon the principal question argued we are not convinced of the un- dness of the conclusions of Judge Thomas as expressed in his ion in the court below, and see no reason for departing from our l custom not to formulate an extended opinion on appeals from rs for preliminary injunctions where we affirm the court below, ss we disapprove the reasoning of its opinion.

ne order is affirmed.

ALLACE, Circuit Judge (dissenting). I do not agree with the ority of the court that we are not authorized to pass upon the tion of the jurisdiction of the court below. In Boston & Maine road Co. v. Gokey (lately decided by this court) 149 Fed. 42,[1] I e given the reasons why I think the court should no longer adhere s decisions in United States v. Lee Yen Tai, 113 Fed. 465, 51 C. A. 299, and Fisheries Co. v. Lennen, 130 Fed. 533, 65 C. C. A. I think, however, that the bill shows a case in which the requisite sdictional amount is involved. One of the rights sought to be ected by the complainant is its system of contracts, which is al- d to be of the value of more than $2,000, and the bill alleges that acts of the defendant which are complained of are destructive eof.

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Fed. 409.)

## BULLOCK ELECTRIC MFG. CO. v. GENERAL ELECTRIC CO.

(Circuit Court of Appeals, Sixth Circuit. December 4, 1906.)

No. 1,550.

ATENTS—INVENTION—ARMATURE CORES.

The Reist patent, No. 508,637, for an improvement in armature cores designed to secure ample ventilation by the use of metal separators between the sections of laminæ of which the core is built up, discloses merely a carrying forward of the idea of prior devices by the use of the same means changed only in form or degree which did not involve invention; it is also void for insufficiency of description of the separators in respect to their thickness, form, and composition to differentiate them from those of the prior art, being described in the specification merely as "thin" and of "metal."

AME.

When the novelty of an invention consists in the dimensions or the material of the new thing devised, the patentee must specify the particular dimensions or the particular material his invention contemplates.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 133-135½.]

ppeal from the Circuit Court of the United States for the Western sion of the Southern District of Ohio.

or opinion below, see 146 Fed. 549.

79 C. C. A. 64.

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Thomas F. Sheridan and C. V. Edwards, for appellant.
W. K. Richardson, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Ju

SEVERENS, Circuit Judge. This is an appeal from an inter tory decree of the Circuit Court sustaining certain claims of a pa awarding a perpetual injunction, and ordering a reference to a ter for the ascertainment of profits and damages. The patent v is the basis of the controversy is No. 508,637, issued to H. G. Rei assignor to the complainant, November 14, 1893, for an "improve in the construction of armature cores" in dynamo electric mach The bill charged the defendant, the Bullock Electric Manufactu Company, with infringement. The answer denied that Reist wa first inventor of the devices for which the patent was granted, av the anticipation thereof by numerous former domestic and fo patents and earlier publications disclosing the supposed inventio Reist, and also denied infringement. In his specification the pat states that his object was to improve the construction of arm cores, so as to obtain ample ventilation for dissipating the heat gen ed therein without detriment to the inductive qualities of the cor

It was well known that in the operation of such machines, heat generated in the core of the armature by eddies of the magnetic in parts remote from the conductor whereby a waste of power wa curred; and besides, the obstruction thus encountered incited which might become injurious to the armature. Other factors suggested which combined to create heat in the core, but that mer ed has been recognized as the principal one. Naturally this diffi was most serious in large armatures consisting of massive collec of iron. The core of the patent in suit is, says the patentee, to be up in the usual manner of annular iron laminæ in layers, and is ported by a spider having arms radiating from the shaft, but in of making the core solid from end to end, he builds it up in sec or bundles of laminæ, and between each two sections he introd skeleton separators which consist of "ribbed castings, riveted or o wise suitably fastened to the side of one of the laminæ, and each a ed to bear against the outside lamina of the next section." In an place, he states that, instead of the ribbed castings, he propos some cases to make the separators of sheet metal, having one po turned up at right angles to the other, which latter is "riveted or o wise secured to" the outside lamina of a section, while the edg the turned up portion bears against the outside lamina of the section as in the first instance. These separators, in one form, co of thin, flat plates secured to the lamina by rivets, and are pro with thin ribs extending outwardly to the outside lamina of th jacent section, the ribs being radial to the centre of the armature another form the ribs are riveted directly on the lamina, and of t selves constitute the separators. In another form several equidi ribs are assembled on a skeleton form of separator, which are spe adapted to the toothed, or Pacinotti, style of armature; the ribs in

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case bearing against the opposite teeth of the separated sections. The material of which the separators shall be composed is "brass or other metal, cast in the shape desired." For a more complete understanding of the structure it seems desirable to exhibit the drawings (except Fig. 6, which is unnecesary) attached to the specifications, as follows:

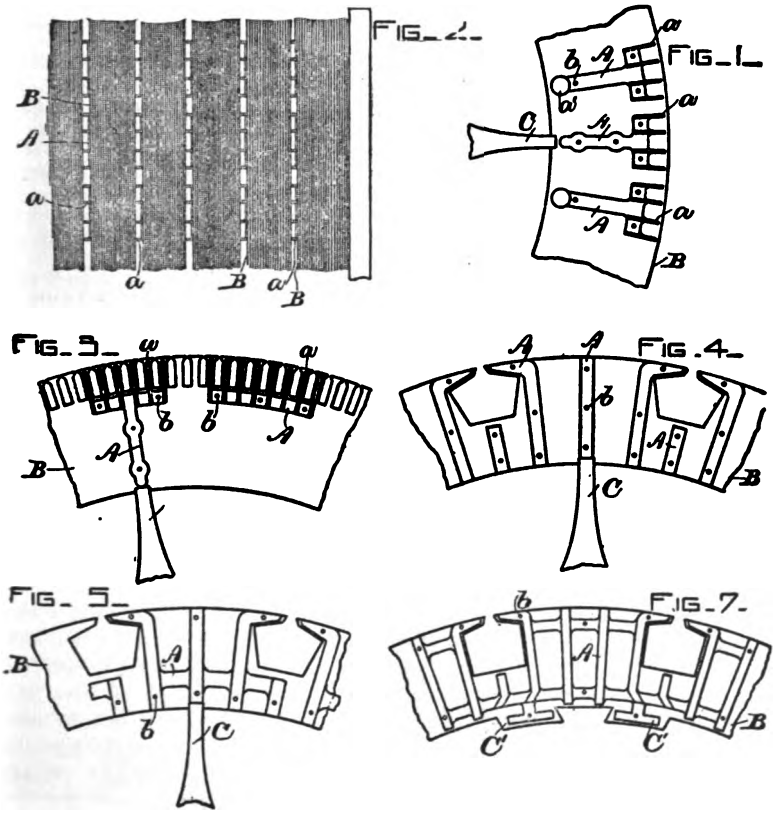


Fig. 1 shows the separators in cross-section of the armature. C is no part of the separator; B is one of the laminæ; A is the flat portion of the separator; and a is one of the ribs set up upon it. Fig. 2 is a face view showing the separated sections of the armature and the separators in place. These two figures illustrate the separators when used in the form of armature wherein the periphery is entire, and on the surface of which the conducting wire is wound. The other figures are of toothed, or Pacinotti, style of armature wherein the core is in regular spaces recessed at the periphery, and so, of course, the rings or laminæ of which it is composed. The wire is wound in the spaces between the teeth. In all the figures, b shows the holes in which the rivets are to be driven to attach the separators to the laminæ. It will be observed that in Figs. 4, 5, and 7, the separators consist only of flat pieces riveted to the laminæ. And it will be noticed also that in Figs.

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1 and 3 the ribs of the separators extend outwardly to the periphery the core, in both forms of the rings, the smooth and the toothed perip eries. The claims which it is alleged are infringed are these:

"(1) A laminated armature core built up in sections, and separators tached to the laminæ between two consecutive sections, as and for the p pose described.

"(2) In an armature core the combination with sections built up of lami of separators consisting of ribs of metal between said sections, and in c tact with adjacent laminæ whereby ventilating space is afforded between inner and outer surfaces of said core, as described."

"(4) In a toothed armature core built up of laminated sections, separat consisting of ribs extending outwardly from the teeth on one of said secti to the corresponding teeth on the adjacent section, whereby said sections mutually supported and air passages radial to the center of said core forded, as and for the purpose specified.

"(5) An armature core consisting of laminæ arranged side by side and s arators attached to certain of the laminæ to form a ventilating space or spa in the core.

"(6) An armature core consisting of layers of laminæ built up in sections bundles, and pronged or skeleton separators attached to an outside lamina each of said sections, whereby ventilating space is provided between adjac sections, as described."

"(8) In an armature a sheet or lamina having teeth or projections for the ception of the armature coils or armature conductors, and metal separat riveted or otherwise secured thereto, said separators extending toward points or free ends of said teeth or projections."

A very comprehensive, and, as we think, extravagant, interpretati is put upon these claims by the complainant's expert in laying the fou dation for his comparison with earlier structures. It is stated that t invention is principally intended for dynamo-electrical machines which the armature revolves inside the stationary magnetic field. E it is further stated that it is also applicable if the machine is one which the field is the revolving member and the armature is stationa And this is apparent. But it will conduce to clearness to discuss t subject by reference to a machine organized in the first of the for mentioned, though some of the characteristics of separators requir in this first form might not be so important in the other, a circumstan resulting from the fact that in one form they are in a rapidly rotati organization while in the other that body is stationary. If this h been an original invention, first devised to secure ventilation of t armature by fixing open spaces in its organization through which cu rents of air could be carried, it must have been admitted that it e hibited a new and very useful device to supply a need that had be recognized in the art as a serious one. But it was not. It follow in the wake of numerous patented inventions intended to meet th need, and the defendant contends that no new idea is shown by t Reist patent, but only the mechanical skill which one conversant wi the subject, and with what had already been pointed out as means f meeting the difficulty, might be expected to supply. It is contend that Reist discovered no new principle or mode of operation which represented by the means he proposed, and that the means which did propose effect no new result, but are the equivalent of former co structions operating in the same way, more skillfully designed perhap but carrying forward an old idea in better forms. This defense mak

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cessary to find out what had already been discovered and known e art when this patentee brought out his method of constructing ators in armatures to effect their ventilation. We cannot under- to critically analyze and exhibit in detail all the former construc- of separators shown in the patents found in the record, but shall ne ourselves to a few which seem to us most relevant and impor- though there are many others in the record which illustrate the al idea of the proper method of providing for ventilating the ar- re, that is, by separating the core into sections and putting separa- etween them, to maintain the spaces for currents of air. We may ce what we have to say by stating that the necessity, or at least reat advantage, of ventilating the cores of armatures had been n and appreciated several years before Reist gave his atten- to it, and that the method of doing this by dividing the core into lel sections and interposing between them separators to hold them , and provide space for the circulation of air in the body of the had been devised, and for several years practiced, in the manu- re of such machines.

1881, one Brown obtained a patent for improvements in arma- which showed them built up of sections of soft iron bars, a od of construction since superseded by the use of thin laminæ in- of bars. The need of ventilation was the same as in the later ruction. For the purpose of securing it, Brown employed plates eet metal, such as Russian sheet iron, secured to the outer bar of section. These plates were provided with flanges turned up at angles from each edge of the plate. The edges of the flanges ot bear directly upon the opposite bar, as in the Reist patent, but cted with the corresponding edges of a similar plate riveted to the site bar. These plates separated the sections and formed an air ber. The sides of the plates were radial to the central line of the ture. Several openings were made in the flanges on both sides e plates through which the air from the central chamber was n through the armature, some of it passing directly through the hery and part sidewise through an opening in the bars, and thence hrough the radial chamber. And in his third claim, he includes plates to form, as he says, "an air chamber which communicates the external air, whereby, during the revolution of said armature, ill be drawn into said chamber and circulate into and through the paces of the bobbins or sections."

November, 1883, patent No. 288,051 was granted to Giles for vention, the sole purpose of which was to provide for the forma- of air spaces in the core of armatures. Instead of dividing the iæ into bundles or sections, he attached separators upon "one or sides of each lamina (he calls them "rings") "oblique ribs uni- ly arranged and spaced, and inclining away from the direction of rmature," a feature shown in other patents, evidently designed cilitate the draft of air. The ribs were attached to the "rings" extended the entire width of them, but were insulated from them prevent electrical currents from traversing the core." All his

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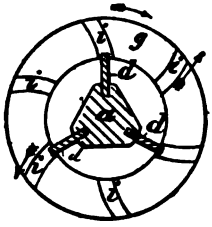
claims call for these ribs as means for separating the rings and af
ing ventilating spaces.

On March 3, 1884, R. E. B. Crompton obtained a patent in Eng
for an invention of improvements in dynamo electric machines w
was patented also in Belgium in 1885, and in the United States Au
7, 1888, where it was numbered 387,343. He states that the objec
his invention are, referring to the armature:

"* * * Third, the arranging of the winding and its insulation so as
low of the free access of a ventilating current of air to every part of its
face, and the providing this ventilating current by simple means."

His preferred form of armature is built up of annular rings of
sheet iron mounted on the dove-tailed radial spokes of the spider.
responding dove-tails are made in the inner edges of the laminæ.
2 shows one of the rings (or "laminæ," or "washers," as they
indiscriminately called in the art) of the Gramme form of core.

FIG. 2



The rings are composed of sections arranged in parallel form
ventilating spaces between the sections. In building up the arma
he lays the rings one upon another, properly insulated, and "at re
intervals as shown at g, g1, g2, g3, etc., the washers may be sp
from one another by strips of material, i, i, which must also ins
them from one another and thus leave radial ventilating channe
space." He says "radial" ventilating channels or spaces. Refe
to his drawing shows that the separators and spaces are in a ge
sense radial, but not quite so, for they are turned backward s
what (having regard to the motion of the armature indicated b
arrow) so as to promote the exit of the air, as in other construc
heretofore referred to. And, he adds cautions applicable to the
ring core and to the toothed ring core to so construct them and
the winding as not to obstruct the ventilating spaces. At this p
we remark upon a matter which will be referred to later. I
drawings Crompton shows in Fig. 2 in cross-section a smooth arm
and the spacing ribs, i, i, extending to its periphery. In Fig.
shows a toothed armature, but the spacing-ribs are not shown.
a question is whether in the latter form he extends the ribs alon
teeth. Inasmuch as he had extended them in the smooth for
the surface, and the teeth are so thin and fragile as to require a
porting separation to prevent their collapsing into the ventilating s
and no other way of preventing it is suggested, we think it is a re

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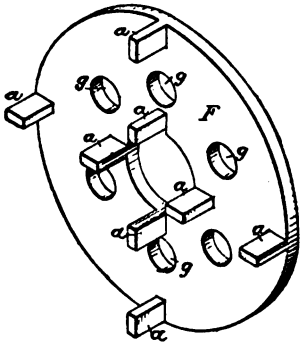
le supposition that he extended the separators back of the teeth to e periphery of the armature. He could not preserve the air space thout resorting to some such expedient. In claim 3 he takes in the parators, called "spacing pieces," as follows:

"(3) In an armature for a dynamo-electric machine, the combination of a de-hable spindle with radial bars and iron disks arranged with spacing-pieces l radial ventilating passages, substantially as set forth."

It is to be observed that it is not here stated of what kind of mate-l his separators are composed. In the specification he terms them rips of material" and, as just noted, in his claim, "spacing pieces." t it is apparent that any kind of insulating material sufficiently rigid maintain the separation would meet the requirements. We say nsulating material" because the patentee takes pains throughout to stress upon the insulation of the rings.

A later patent to R. L. Cohen, No. 397,340, was granted February 1889, the object of which was to so build up the armature "that nple opportunity will be afforded for the perfect ventilation of the mature during the working of the machine." In this the armature s divided into sections, at one end of which were plates extending the periphery of the core. On these plates were projected "lugs" they are called in one place, or "distance pieces" as they are else-here called, or "spacing pieces" as designated in the claims, bear-g against the opposite section and providing the ventilating spaces. g. 3 shows one of these plates with the spacing pieces, a, a, projected ereon.

*FIG. 3.*




Two features of these spacing pieces may be noticed here. They e radial to the center of the armature, and they are uniformly set th their wider dimension in the line of the current of air plainly in-cating that the patentee had in mind the idea of so constructing his acing pieces as that they should economize room for the current of in the ventilating spaces. Claim 1 in this is as follows:

"(1) The combination of the shaft of an armature with the shell comprising llow bobbins and interposed spacing-pieces, each hollow bobbin consisting

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of opposite end disks and an interposed tubular shell, all substantially specified."

In a later patent to Cohen, of March 11, 1890, he converts t "wings or lugs" in each radial line into one wing extending acr the width of the rings. In other respects the organization of armature exhibited in the Cohen patents is unlike the forms in other patents to which we have referred; but the difference does materially affect the particular purpose common to all these constr tions in the provision of ventilating spaces, which we are now c sidering.

The new thing which Reist claims to have invented is his separato and the question is whether he made any advancement beyond former art which partakes of the quality of invention. And if did in what did it consist? Separators in a considerable variety forms had, as we have seen, already been provided. There was no ing new in this general fact. Their purpose in such machines w understood. The principles and method of construction had b illustrated and were well known. If he could develop some new pr ciple or some new means having the qualities of originality and util he might, if the sources of his new light were obscure and requi more than the intuition and skill of those in the practice of the art discover or recognize them, be entitled to a patent. But, if he w in the beaten path and saw only how the means already known a practiced could be improved in detail, such as by changing the fo extending the size, carrying the same thought into another part of same structure with no change in the character of its function th or in any like case which does not display something extraordina something beyond the sphere of the common intelligence of those c versant with the art, such exercise of skill would not be inventi Referring to his claims, it would seem as if Reist considered hims the originator of the idea of using separators as a device for the di sion of a solid armature and transmitting the air between the sectio But we have seen how far this was from the fact. It had for a nu ber of years been embodied in various forms and put into practi use. He simply changed the form of such separators and attac them to one of the outside lamina of the sections. By this attachm before using those parts in building the armature, he made them tegral as they were in Cohen's patent, and in Giles', and in the earlier patent to Brown. As has been already shown, in some of previous structures the separators were attached to the sections; others they were not, and the clamping of the sections together see to have been relied upon for holding the separators in place. A indeed, there could be no invention in making such attachment something, if it seemed necessary to maintain the separators in po tion, and prevent their flying out in the rotation of the armature; a what mode of attachment could be more obvious than securing it the laminæ with which it was in contact in former constructions?

It is contended that there is an advantage in Reist's conception making the strips and spaces radial to the center of the armatu Whether there is any advantage in an adherence to that form we c

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not say. It would seem so. If there is, it was so formed in Crompton's patent, and such was the form in Cohen's and in others. But the principal novel feature which Reist contemplated was that his separators should be thin; the object being to obstruct as little as possible the ventilating spaces. It seems hardly possible to say that there could have been any invention in this even if Reist was the first to advance in set form such an idea. Every electrician would appreciate that it was desirable to use as little inert material as might be, as well as that what was used should be put in the line of the current of air, and not cross-wise of it. This Crompton did to make his "radial ventilating spaces" and it was what Cohen did in both his patents when he set the sides of his spacing pieces in the direction of the air current. But Reist does not state how thin his separators shall be, nor how far they shall project toward the opposite section. If it be answered that he leaves these things to the judgment of the builder, the result would be that he appreciated that the builder would be competent to determine what would be the right dimensions for properly ventilating the armature, and this had been the only problem, if we call it such, that Reist himself had before him, for the state of the art was already advanced to that question. Supposing the artisan to take up the work of building an armature and using Reist's separators having ribs set up on a base attached to a lamina, how far shall they project? And of what thickness shall they be? Any intelligent person would say that these dimensions should be in proportion to the size of the armature, the bulk of the material to be ventilated. And so what would be thin in a large armature would be thick in a small one. Thus it is a question of degree. Or suppose the artisan wishes to construct a ventilated armature, and does not care to use Reist's separators, how shall he know in what manner he shall avoid the Reist patent? How thin must his separators be to do this? Or suppose a purchaser wishes to buy one. He must look out for the patent. By what test or comparison shall he be guided? These inquiries enforce the rule that the patentee must describe with sufficient certainty the particulars of his invention so that the artisan and the public may know the character and limits of it, and how it is to be distinguished from others which the one may make, or the other purchase, in safety. Again some of the forms which Reist suggests as embodying his invention consist only of a flat member lying on the face of the lamina. It must be obvious that in such case it must be thicker than in case he forms a rib or lug upon it. For ventilation could not be adequately secured without a considerable thickness of his flat separator. The same conditions in respect to the thickness of his separator would exist as in the Crompton patent, and in both cases the same question would arise, how thick shall the separator be? And, if in Crompton's case that question is left to the judgment of the builder, so it is in Reist's, and it follows that the latter has taken no forward step whatever. This feature of the indefiniteness of description was adverted to by the Chief Justice in delivering the opinion of the court in Guidet v. Brooklyn, 105 U. S. 550, 26 L. Ed. 1106, and influenced the decision. The patent was for an improved stone pavement. In earlier practice the blocks had been comparatively smooth but slightly rough on the sides,

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and when put in place their upper edges were too near together afford sufficient holding for the caulks of the shoes of draft hors used on the road, and strips of wood or stone had been put in t spaces or the edges of the blocks were chamfered. The patentee spe fied that the blocks he proposed should be sufficiently rough to ho them in composition sufficiently far apart to give the proper spa between their edges, and so to relieve the objection. But the cou referring to (among other things) the fact that the patentee did n specify any degree of roughness, held that he had only carried c an old idea making a change, not definitely indicated, in degree on and that the patent could not be sustained. The case of Preston Manard, 116 U. S. 661, 6 Sup. Ct. 695, 29 L. Ed. 763, is of still mo direct application to this feature of the patent. The patent was f an improved fountain hose-carriage. The new element brought in combination with old elements was "a reel of large dimensions to low the water to pass through the hose when partially wound thereon Mr. Justice Gray, in the opinion, said:

"The requisite diameter of the reel, and its proportion to the size of t hose, are not defined in the specification, but are left to be ascertained by e periment, or from general knowledge. If the patentee had discovered an thing new in the size or proportions of the reel, requisite to allow the wa to flow through the hose, he should have described it with such precision to enable others to construct the apparatus."

It was reasonable to suppose that a large reel would carry a ho giving a more direct passage for the water, than one with narrow convolutions, but the improvement was only in the form and size of t reel, and there was no specification of the size except that it should large. And the very gist of Reist's invention was in the dimensio of his separators.

In Howard v. Detroit Stove Works, 150 U. S. 168, 14 Sup. Ct. 37 L. Ed. 1039, the patent was for an improvement in stoves. T novel feature of it was a flange cast or riveted upon the inside of t lower end of the fire pot. This flange formed the support of t grate. This part of the fire pot was exposed to undue expansion reason of excessive heat at that place. Stoves had formerly been co structed with a flange on the inside of the upper edge of the ash-bas just under the fire pot, and the grate rested upon this. The paten conceived that it would be an advantage to put the flange at the b tom of the fire pot and make it so wide as to gather the ashes there, a thereby minimize the heat in that part of the fire pot. And he o tained a patent embodying that idea. But, though he described t flange and the purpose of it, he failed to state what the inward proj tion of it should be. For this reason the patent was held void. It w also held that the transferring the flange from the ash-basin to the f pot did not involve invention. And see, also, the Incandescent Lam Patent, 159 U. S. 465, 16 Sup. Ct. 75, 40 L. Ed. 221. These ca would seem to lead to the conclusion that the description of the sepa tors in this patent is insufficient, and not in compliance with the quirements of the statute; and, if so, the patent is void.

But there are other considerations leading to the same result, wh we think should be stated. In none of the claims of the patent in s

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is it stated whether the separators are to be of the form of a flat spacing piece lying against the lamina or of such a piece with a flange or rib upon it, and either would answer the calls of the claims. And some of the forms in earlier patents would answer just as well. In some of the forms of Reist's separators there is a web or skeleton form the function of which is to hold the ribs in proper relation to each other. But the flat sheet metal plate in the Brown patent attached to the side of the section performed that function. In Cohen's, a disk in the same form as the core of the armature held the distance pieces in place. And as we understand the patent of Giles, his "ribs" were attached to the lamina. For he says his "rings" were provided with "ribs." And in two of these patents the lamina performed the function of the web in holding the separators in place and therefore were the equivalents of a web. And in Cohen's the web to which the separators were attached consisted of a disk. But Reist makes no claim which includes the feature of a web unless it be in the projection of the separators upon the teeth of a Pacinotti armature, a matter we shall consider presently.

The eighth claim of the patent is for separators in a toothed armature extending upon the teeth and attached thereto, and this, it is contended, is a particularly advantageous feature. Referring again to the specification, we find it stated that the object of this construction is to hold the teeth of the opposite laminæ apart and prevent their collapsing into the ventilating channel when the sections of the armature are clamped and pressed tightly together. But, having understood the need of air channels between the sections, and having adopted a scheme of separators to maintain the spaces, which separators extended to the periphery of the entire rings of the Gramme form and used the same device in the body or entire portion of the rings, there could be no invention in extending the same scheme to accomplish an identical purpose in respect to the teeth in the other form. It is as plain a case as can be for the application of the rule laid down in Smith v. Nichols, 21 Wall. 112, 22 L. Ed. 566, and followed in many subsequent cases by the Supreme Court, and in several cases by this court. That rule, as applied to the facts of this case, is that the mere carrying forward a new or more extended application of the original thought, is not such invention as will sustain a patent.

An apposite case among our own decisions is Soehner v. Favorite Stove & Range Co., 84 Fed. 182, 28 C. C. A. 317, where it was held that, it having been ascertained that an advantageous form in which to build the sides of a stove was to make them curved in along the upper and lower borders so as to enlarge the oven space, there was no invention in extending a similar form to the vertical flues in the rear end of the stove to accomplish a like purpose of enlarging the flues. And in American Carriage Co. v. Wyeth, 139 Fed. 389, 71 C. C. A. 485, 488, we held that the prolongation of a flanged strip of metal, which had been used to connect and hold in place the knees of a sleigh with the rave, so as to connect and hold in place the knee and the runner was not invention, citing L. Schreiber & Son v. Grimm, 72 Fed. 671, 19 C. C. A. 67, and Dunbar v. Myers, 94 U. S. 187, 24 L. Ed. 34.

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While the specification of the patent in suit states that the separator must be of metal and expresses a preference for brass castings, there is no limitation to any kind of metal in any of the claims, and in the first, fourth, fifth, and sixth claims, the separators are not required to be of metal, while in the second and eighth they are. And if some kind of metal is required, it is not stated in these claims what kind it shall be; whether it should be a kind which shall insulate the opposite laminæ, or be of a kind which shall have conductivity for the magnetic current. In some of the previous patents the material of the separators is not stated. In others it is stated to be of metal, and in one, of hard rubber. If the purpose of Reist was to introduce some kind of metal which had not been used before, as a good medium for the movement of the magnetic flux, or for insulation, or for any other purpose, he should have stated what it was. In the absence of any attempt to do this, we incline to think that he thought of metal for the material because of its greater strength and rigidity in proportion to the space it would occupy. But it is not material since he proposes no special kind of metal which would distinguish his own from former constructions. Another rule which has been only suggested thus far by the recital of the facts may now be formally stated. Among the facts it appears that all the features of the means proposed by Reist were to be found in earlier patents and that what he did was no more than selecting from them parts which in his combinations performed essentially the same functions as they did in the organizations from which they had been taken. We have often held that there is no invention in this, and such is the rule recognized by the Supreme Court. We refer to a few of our own decisions: Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co., 116 Fed. 363, 369, 53 C. C. A. 583; Burnham v. Union Mfg. Co., 110 Fed. 765, 770, 49 C. C. A. 163; Overweight Counterbalance Elevator Co. v. Henry Voght Machine Co., 102 Fed. 957, 761, 43 C. C. A. 80; Campbell Printing Press & Mfg. Co. v. Duplex Printing Press Co., 101 Fed. 282, 294, 41 C. C. A. 351. There is a recognized exception to this rule, or rather counterpart of it, when in the new combination a new mode of operation is effected which produces an original result, as we said in Dowagiac Mfg. Co. v. Superior Drill Co., 115 Fed. 886, 901, 53 C. C. A. 36. But this must be something novel in principle, and not a combination operating upon a principle which was common to the old machines from which the elements were taken, as in the case at bar.

For the reasons stated, we are of the opinion that there was no patentable invention in the Reist patent. We admit that it exhibits a good, a skillful, and perhaps a more useful piece of workmanship than had before been attained. But it is in substance only an illustration of the principles discovered and applied by his predecessors by means the same as, or equivalent to, his own. It is stated and pressed upon our attention that separators like his have gone into extensive public use. But it is easy to see how this might happen without attributing to the patent anything new in principle. A thing or a combination of cooperating parts may be invented and the original embodiment of it be shown in a crude and imperfect form. The skill of the trained work-

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man will develop the idea of the inventor in more refined, more delicate and more exactly suitable forms than the original. He may cut away needless bulk, he may increase the size of parts, he may make them stronger, if need be, by the substitution of one familiar material for another, make them lighter or heavier, he may divide one part into two, or combine two in one, or make any other transformation of details, so long as he is pursuing and working out the original discovery or invention by the exercise of the insight, good judgment, and expertness which he is expected to possess and apply. And this improvement may go on so long as any improvement in bringing the means already supplied to greater perfection can be made, and yet it continues to be only an embodiment of the primal idea. In all the useful arts such improvement as this is being continually carried forward. It is easy to understand that purchasers should prefer and insist on having the article, especially if it be a machine, in its best form, and the latest improvement would be likely to measurably supersede the older one. Another thing which affects the value of the presumption arising from the general acceptance and use of a thing is that in modern usages of trade such articles are often pressed upon the attention of purchasers instead of being chosen. And in many instances an article gets into general use from being pushed upon the market by energetic tradesmen with strong financial backing. No doubt the presumption still obtains, but it does not and for that matter never did, have a controlling influence, unless the question of invention hangs in doubt. And our impressions of the present case are such that we do not invoke the presumption as a helping factor.

But, if we were to hold the patent valid, it must be because of his adaptation of the separators for attachment to the adjacent laminæ for the purpose of securing them in place. In his description he enforces this point, and in all the drawings which indicate the manner of associating the separators with the laminæ, holes are shown for the riveting. And in the form of separator wherein he proposes to turn up a part of the separator to constitute a rib, it would seem to be necessary that the part lying against the lamina would be secured to it, in order to hold the ribs in proper position. In his directions for building the armature, he says: "A suitable number of laminæ are bundled together in sections, and a lamina provided with separators, as shown added thereto;" which indicates that the attachment has already been formed. It is true that in his second claim there is no requirement that the separator shall be attached to the lamina. But in others there is, which indicates an intended distinction. And a question might arise whether this claim is not broader than his invention, if the method of attachment is to be regarded as the substance of the invention as we are now supposing. But the defendant does not adopt this special feature which we are now crediting to the Reist patent. Its separators are not attached to the laminæ, but in that one of its forms which most resembles Reist's, depends upon a dove-tailed connection with the arms of the spider to prevent their being thrown out by centrifugal force during the rotation of the armature, a method of connecting the body of the core with the spider previously in use. The



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defendant connects sections of the ribs together by a web to keep t
in proper distances apart. But this was accomplished in a similar
in the structures of older patents, not probably by a web so thin.
as the complainant does not limit the thickness of the web, we
dismiss that subject from further consideration, with the added ren
that the web used in their separators by the respective parties is
we gather from the record, of substantially different thickness.
other form of the defendant's separator consists of a triangular ba
tached to the lamina by raising fingers cut into the body of the lan
on opposite sides of the bar and after the bar is inserted between t
fingers, pressed down upon the outer surfaces of the bar; its other
resting upon the lamina. This triangular bar has no adaptation for
attachment to the lamina as would prevent it from being thrown
by centrifugal force, for the thin strips of fingers of the lamina w
have little griping force of their own and the security of the bars f
longitudinal displacement would depend rather on the compressio
the sections in clamping them together to form the core, than on
capacity of the fingers. We do not think that this can be the att
ment intended by the Reist patent, which seems to require a more i
gral union, one which would of itself prevent the slipping out of
separator. The separator has little or no resemblance to that of
patent unless it be to that form consisting of a flat bar thick eno
to give the requisite spacing and that was the form of rib shown in
Giles patent. The complainant's expert argues, curiously enough,
this form of defendant's separator infringes the Reist invention
withstanding it is too bulky. But he differentiates Reist's separa
from the earlier ones on that very ground. And, in fine, when
separator of the defendant is brought into combination with the lam
it constitutes a substantially different combination from anyt
shown by the patent in suit, if it be conceded that the separators of
latter differ substantially from those in earlier patents by reason of
attachment to the lamina. We are therefore of opinion that, if the
troversy were brought to a question of infringement, the defenda
form herein first considered does not infringe, and we are strongly
clined to think that the second does not.

The decree of the court will be reversed, with direction to dismiss
bill, with costs.

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# CLEMENT v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 12, 1906.)

No. 2,377.

RAND JURY—SELECTION—FEDERAL COURTS—"JUDICIAL DISTRICT."

Act Cong. May 11, 1858, c. 31 (11 Stat. 285), created the state of Minnesota into one federal judicial district, and Act March 3, 1859, c. 76 (11 Stat. 402 [U. S. Comp. St. 1901, pp. 316, 446]), provided for the holding of terms of court in three different cities. Act April 26, 1890, c. 167, § 1, 26 Stat. 72 [U. S. Comp. St. 1901, p. 374], declared that, for the purpose of holding terms of court, the district of Minnesota was divided into six divisions, and section 6 that grand and petit juries should be summoned for each of the terms of such court, and the petit jury should be competent to sit and act as such jury in either the Circuit or District Court at such terms. Act Cong. July 12, 1894, c. 132 (28 Stat. 102 [U. S. Comp. St. 1901, p. 376]), provided that all criminal proceedings instituted for the trial of offenses against the laws of the United States arising in the district of Minnesota shall be brought, had, and prosecuted in the division of the district in which the offenses were committed. *Held*, that a federal grand jury was not required to be drawn from the division of the district in which the offense to be investigated was committed, but might be properly summoned from any portion of the state constituting "the district" regardless of the place where the prosecution was triable.

JURY—PETIT JURY—SELECTION—FEDERAL COURTS.

Act Cong. April 26, 1890, c. 167, § 1, 26 Stat. 72 [U. S. Comp. St. 1901, p. 374], divides the judicial district of Minnesota into six divisions, and section 6 provides that the grand and petit juries shall be summoned for each of the terms of Circuit or District Court, and that the petit jury shall be competent to sit and act as such jury in either of such courts. Act July 12, 1894, c. 132, 28 Stat. 102 [U. S. Comp. St. 1901, p. 376], requires all criminal proceedings instituted for the trial of offenses against the United States arising in the district of Minnesota to be brought, had, and prosecuted in the division of the district in which the offenses were committed. Rev. St. § 563 [U. S. Comp. St. 1901, p. 455], confers on District Courts of the United States jurisdiction of all crimes and offenses cognizable under the authority of the United States committed within their districts, and Const. Amend. 6, declares that in all criminal proceedings the accused shall enjoy the right to a trial by a jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. *Held*, that a petit jury for the trial of federal offenses arising in Minnesota might be properly summoned from any portion of the state, and that accused was not entitled to a jury exclusively summoned from the division of the district in which he was triable.

RIMINAL LAW—APPEAL—CONTINUANCE—DISCRETION—REVIEW.

The denial of an application by accused for a continuance will not be reviewed on a writ of error, in the absence of a showing that the trial court's discretion was abused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3045–3049.]

AME—CONTINUANCE—INFIRMITY OF ACCUSED—DISCRETION.

Accused, an aged bank president, was arrested February 6, 1905, charged with violating the national banking law, and was indicted on June 9th. In the meantime he was in his usual state of health, but was quarantined because of a contagious disease in his family. After an unavailing demurrer to the indictment and the entry of a plea of not guilty, he applied for a continuance on physicians' affidavits that he was in such a feeble and weak condition that he was unable to endure the strain attendant on a protracted trial, and his own affidavit that he was so infirm as to be unable to make the requisite preparation for trial.

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A counter affidavit alleged that the government's witnesses were all
and infirm, and for that reason their attendance at the next ter
court was uncertain. The court denied the continuance, recitin
its order that the trial could be conducted in short sessions, and set
case for trial on June 21st. On that day a similar motion was u
cessfully made before another judge, and after the government
closed its case on June 30th the hearing was adjourned to July
*Held*, that the denial of the continuance was not an abuse of discre

5. SAME—INDICTMENT—DEMURRER—PREJUDICE.

Accused was indicted for violating the national banking act unde
indictment containing 27 counts. He demurred unsuccessfully t
counts, and was found guilty on 24, and sentenced to a term of 8 y
in the penitentiary on each count, with a provision that time should
on all concurrently. *Held* that, as the sentence did not exceed that w
might rightfully have been imposed on any one count, defendant was
prejudiced by the overruling of his demurrer to 10 counts of the
dictment.

6. SAME—MOTION IN ARREST—TIME.

While accused may raise the question of the sufficiency of the in
ment to charge a public offense by motion in arrest of judgment,
better practice to raise the question by demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal
§ 2454.]

7. INDICTMENT—SUFFICIENCY—STATUTES.

Under Rev. St. § 1025 [U. S. Comp. St. 1901, p. 702], providing tha
far as possible, consistent with assuring accused a fair and impartial
the court shall disregard form, imperfection of statement, and unimpo
defects which do not reasonably tend to prejudice accused, an indict
is sufficiently certain if it alleges facts sufficient to enable accuse
make his defense, and to plead the judgment in bar of any further
ecution for the same offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment
Information, §§ 177–179.]

8. SAME—CONSTRUCTION OF.

Technical accuracy must yield to the fair and obvious meaning o
language employed, when tested by the ordinary rules of construction,
regard must be had to the necessity of punishing the guilty, as well a
quitting the innocent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment
Information, § 174.]

9. BANKS AND BANKING—NATIONAL BANKING ACT—VIOLATION—INDICTM

A count in an indictment for violating the national banking ac
leged that accused, as president of the bank, made an entry in the ba
daily journal of the words and figures following: "Other Real Es
A. Barton Farm, $3,350.00;" that the entry indicated that the south
of a specified quarter section of land was a certain 80-acre tract know
the "Barton Farm," and was an asset of the bank in the sum of
350.00; that the entry so made was false, in that the same desc
land was not then and there an asset of the bank of the value of
350.00, or of any sum whatsoever. *Held*, that such count was not
fective as failing to charge that the A. Barton farm was know
described in accordance with the description recited, or was ident
therewith, or because it was not charged that the A. Barton farm wa
an asset of the bank.

10. SAME—FALSE REPORTS.

Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], provides that every p
dent of a national bank who makes any false entry in any book or re
of the association, with intent to injure or defraud it or any other
son, company, or body politic or corporate, shall be guilty of a m
meanor, etc. *Held*, that an indictment under such section, alleging

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accused, while acting as president of a national bank, made a false entry in a report to the Comptroller of Currency, that the lawful money reserve in the bank, consisting of gold coin, was $23,955, when in fact the bank only had $21,955 in gold coin as lawful money reserve, was not objectionable for want of an allegation that the lawful reserve exceeded the amount the bank actually had on hand; the gist of the offense being the making of false entries in the report.

SAME—INTENT TO DECEIVE.

Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], provides that, if any president of a national bank makes any false statement concerning the association with intent to injure or defraud the association or any other company, body politic, or any individual person, or to deceive any officer of the association, or any agent selected to examine the affairs of any such association, he shall be guilty of a misdemeanor. *Held* that, where the president of a national bank made a false report to the Comptroller of the Currency with intent to deceive an examiner who might be appointed to make an examination of the bank, as provided by section 5240 [U. S. Comp. St. 1901, p. 3516], such act constituted an offense, irrespective of the existence of any other incidents disjunctively mentioned in section 5209.

SAME—EVIDENCE.

In a prosecution of the president of a national bank, evidence *held* sufficient to justify a conviction for willfully misapplying the bank's funds, and converting the same to the use of himself or others, in violation of Rev. St. § 5209 [U. S. Comp. St. 1901, pp. 3491, 3497].

SAME—EVIDENCE—CERTIFICATE OF COMPTROLLER OF CURRENCY.

Where a certificate of the Comptroller of the Currency recited that a certain bank had complied with all the provisions of the act of Congress of July 12, 1882, authorizing an extension of the corporate existence of such banks, and declared that the bank was authorized to have succession until November 21, 1908, such certificate was conclusive evidence, in a prosecution of the president of the bank for violating the national bank act, of a compliance by the bank with all necessary conditions precedent to the extension of its charter.

SAME—NATIONAL BANK CHARTER—EXTENSION—ACCEPTANCE.

Where a national bank continued its existence and performed the functions of such an association after the expiration of its original corporate existence for a long period of time, it would be presumed to have accepted the benefit of a certificate executed by the Comptroller of Currency extending its corporate existence.

Error to the District Court of the United States for the District Minnesota.

e defendant, Clement, was indicted in the District Court of the District innesota for the Third Division for making false entries and willful miscations of the funds and credits of the First National Bank of Faribault, hich he was at the time president, in violation of section 5209 of the sed Statutes [U. S. Comp. St. 1901, p. 3497]. He in due time challenged panels of the grand and petit juries because they were drawn from the ict at large. and were not composed of persons who resided in the Third sion of the district. He demurred to some counts of the indictment on the nd of duplicity. He moved for a continuance of the case at the time it first set for trial on the ground that physical infirmities disabled him preparing for trial at that time. He interposed at the close of the case murrer to the evidence, on the ground that it failed to establish the nission of any of the offenses charged. He filed a motion in arrest idgment on the ground that the indictment charged no criminal offenses. e challenges, demurrers, and motions were overruled, the trial was and defendant found guilty on 24 of the 27 counts of the indictment, sentenced to a term in the penitentiary of 8 years on each count, with provision that time should run on all concurrently. Exceptions having

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been duly saved to the foregoing rulings, the case is brought here for review by writ of error.

George N. Baxter (Daniel W. Lawler, on the brief), for plaintiff in error.

Paul A. Ewert (Charles C. Houpt, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Was the grand jury properly summoned? By the act, admitting Minnesota into the Union, of May 11, 1858 (chapter 31, 11 Stat. 285), and by other provisions of law, Minnesota was made to constitute one judicial district. Provision was made for the appointment of a district judge for the district, and for the holding of terms of court at Preston (later at Winona) and St. Paul. Sections 531, 551, Rev. St. [U. S. Comp. St. 1901, pp. 316, 446]; Act March 3, 1859, c. 76, 11 Stat. 402. By the act of April 26, 1890 (chapter 167, § 1, 26 Stat. 72 [U. S. Comp. St. 1901, p. 374]), it was enacted as follows:

"That for the purpose of holding terms of court the district of Minnesota is hereby divided into six divisions to be known as the 1st, 2d, 3d, 4th, 5th, and 6th divisions."

The counties constituting these divisions, the terms and places for holding the court therein were then designated, and section 6 of the act provides as follows:

"That the grand and petit jury shall be summoned for each of said terms, which petit jury shall be competent to sit and act as such jury in either or both of said courts [circuit or district] at such terms."

By the act of July 12, 1894 (chapter 132, 28 Stat. 102 [U. S. Comp. St. 1901, p. 376]), it was enacted as follows:

"That all criminal proceedings instituted for the trial of offenses against the laws of the United States arising in the district of Minnesota shall be brought, had and prosecuted in the division of said district in which offenses were committed."

From the foregoing acts, which constitute all the legislation bearing on our present inquiry, it seems clear that only one judicial district has ever been established in the state of Minnesota; that this district has been divided for the convenience of suitors in the trials of causes into six divisions, not as general or separate judicial districts, with an independent court for each, but for the limited purpose disclosed by the act of 1890, "of holding terms of court" in the district of Minnesota.

The Revised Statutes (section 563 [U. S. Comp. St. 1901, p. 455]) give to the District Courts of the United States jurisdiction "of all crimes and offenses cognizable under the authority of the United States committed within their respective districts"; in other words, the jurisdiction of a district court is by law made coextensive with the territorial area of the district, and, unless limitations are found in the congressional acts, the right to draw a grand jury from the district as a whole would seem to be unquestionable. We are, however, not left

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thout controlling authority on this proposition. The Supreme Court Logan v. United States, 144 U. S. 263, 297, 12 Sup. Ct. 617, 36 L. . 429, considering similar legislation for the state of Texas, decided versely to the contention of the defendant in this case. Referring a provision of that legislation similar to that found in the act of ne 12, 1894, supra, Mr. Justice Gray, speaking for the court, says:

"This provision does not affect the authority of the grand jury for the trict sitting at any place at which the court is appointed to be held to sent indictments for offenses committed anywhere within the district. only requires the trial to be had and writs and recognizances to be re- ned in the division in which the offense is committed. The finding of the ictment is no part of the trial."

In Post v. United States, 161 U. S. 583, 587, 16 Sup. Ct. 611, 40 L. . 816, the Supreme Court had under consideration the legislation which attention has already been called relating to the creation and vision of the district of Minnesota, and, after citing with approval extract just quoted from the Logan Case, Mr. Justice Gray, again eaking for the court, says:

"Criminal proceedings cannot be said to be brought or instituted until formal charge is openly made against the accused, either by indictment sented or information filed in court, or, at the least, by complaint before a gistrate."

In Rosencrans v. United States, 165 U. S. 257, 260 and 261, 17 p. Ct. 302, 304, 41 L. Ed. 708, Mr. Justice Brewer, speaking for Supreme Court, after calling attention to sections 563 and 629 of Revised Statutes [U. S. Comp. St. 1901, pp. 455, 503], giving to strict and Circuit Courts jurisdiction of the crimes and offenses com- tted within their respective districts, says:

"These statutes declare the general rule that jurisdiction is coextensive th district. That being the general rule, no mere multiplication of places which courts are to be held or mere creation of divisions nullifies it. In- d, the place of trial has no necessary connection with the matter of ritorial jurisdiction. * * * We find many acts, some increasing in a trict the places of trial, and others in terms subdividing the district into isions. The former have no effect on the matter of jurisdiction. Some these latter acts specifically limit the jurisdiction in criminal actions of the irts held in a division to the territory within that division [giving in- nces], while, on the other hand, some contain no such provision, as in the se of Minnesota (Act April 26, 1890)."

In Barrett v. United States, 169 U. S. 218, 18 Sup. Ct. 327, 42 L. . 723, the Supreme Court, construing acts of Congress relating to uth Carolina, held that a division of the state into "two districts," ographically speaking, did not divide the state into two judicial stricts, so as to confine the jurisdiction of the Circuit Court to the ritorial limits of each separate "district."

The foregoing authorities are conclusive of the proposition that the ding of the indictment against Clement by a grand jury drawn from e body of the district of Minnesota for a crime committed in the ird division of the district is not a violation of the provisions of e act of July 12, 1894, but, on the contrary, in harmony with them. Was the petit jury lawfully summoned from the body of the district, should it have been summoned from the counties composing the

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Third division of the district? Argument is drawn from the rule the common law requiring juries to be summoned from the vicin where the crime is committed, so that the accused can have the be fit of his own good character and standing, if he has such, and of s knowledge as the jury may possess of the character of witnesses may testify for and against him. A full recognition of this rule leaves the question, what is the vicinage, open. We think the si amendment to the Constitution answers it. It ordains that:

"In all criminal prosecutions, the accused shall enjoy the right to a spe and public trial, by an impartial jury of the state and district wherein crime shall have been committed, which district shall have been previo ascertained by law."

By the judiciary act of 1789, and afterwards by acts providing the admission into the Union of states other than the original Congress, from time to time, ascertained and divided the several st into judicial districts, in harmony with the requirement of the c stitutional provision just referred to. In the exercise of its delega power, Congress, as seen in the legislation already referred to, crea but one district out of the state of Minnesota.

In discussing this article of the Constitution, learned counsel defendant has ingeniously argued that, even if the entire state is district for some judicial purposes, it is not the district previo "ascertained by law *for the trial of indictments for criminal offens* It may not be the district ascertained by law for the trial of such dictments, and at the same time it may be the judicial district as tained by law from which an impartial jury is to be summoned. sixth amendment does not use the italicized language; it stops the provision requiring the district from which the jury is to be ta to be ascertained by law. There is obviously a distinction between purpose of ascertaining the district, as contended for by defenda counsel, and the purpose of ascertaining the district contemplated the amendment. Article 3, sec. 2, of the Constitution, prov that the trial shall be held in the state where the crime was commit The sixth amendment, among other things, conferred the right of t by jury, and guarantied that the jury should be taken from the s if composed of only one district or from that particular district in state containing more than one wherein the crime was commit and for the purpose of rendering certain that particular district, vision was made for its being previously ascertained by law. Logan, Post, Rosencrans, and Barrett Cases, supra, are ample auth ty that different places provided as a matter of convenience for the t of offenses committed within a district may be and frequently are fi by law without affecting the general jurisdiction of the courts over whole district. The district for the latter purpose, according to command of the sixth amendment, as construed by the foregoing ca must be ascertained and fixed by law as a judicial district; and w so ascertained and fixed, and not till then, it bounds and limits the ritory from which a jury may be summoned to try cases origina therein. If acts establishing separate courts within a given dist for the convenience of suitors should by clear provision limit t jurisdiction and the area from which juries are to be summoned

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smaller territory, such acts would doubtless create separate judicial districts, and require juries to be summoned therefrom. But there is no such purpose manifested in the acts relating to Minnesota. Although they subdivide the one judicial district, clearly and unambiguously created, into six subdivisions "for the purpose of holding terms of court," they evince no purpose to establish those subdivisions as separate judicial districts, within the meaning of the sixth amendment.

There was no error in overruling defendant's challenge to the panel of petit jurors.

Did the court below err in refusing defendant's application for a continuance? It is settled by the uniform current of authority that the decision of the trial court upon such an application is purely discretionary, and not subject to review unless its discretion was abused. Isaacs v. United States, 159 U. S. 487, 489, 16 Sup. Ct. 51, 40 L. Ed. 229; Goldsby v. United States, 160 U. S. 70, 16 Sup. Ct. 216, 40 L. Ed. 343. The question is, therefore, do the facts of the case show that the learned trial judge acted in the exercise of a sound and reasonable discretion in denying the motion for a continuance, or do they show that he abused that discretion? Clement was arrested February 6, 1905, charged in the complaint with some of the offenses afterwards charged in the indictment found against him on June 9th. Between these last-mentioned dates he was in his usual state of health, but was quarantined at home for a period of about one month by the presence in his family of a contagious disease. After an unavailing demurrer to the indictment and the entry of a plea of not guilty the motion for a continuance was made. It was supported by affidavits of physicians and others, tending to show that Clement was in a feeble and weak condition, and unable to endure the strain attendant upon a protracted trial, and his own affidavit to the same effect, and also to the effect that he was unable, by reason of his infirm condition, to make the requisite preparation for his trial. A counter affidavit was filed by the United States attorney, tending to show that the cashier and directors of the Faribault bank, upon whom the government relied for evidence in the case, were all aged and infirm, and for that reason uncertain to attend court at its next term. The court below, then presided over by Judge Lochren, after considering the motion, on June 14, 1905, denied it, assigning the following reasons:

"That the defendant is feeble is apparent from his appearance, and that condition is the result of his age, for one thing, and of his mental disturbance on account of his misfortunes and the charges that are made against him at this time. The serious question is whether there is a probability of his being in any better condition if the case should be adjourned or continued until the next term of court. There is no special physical disability, except age, and that certainly would not be mended. The defendant does not appear physically unable to be in court, and the testimony shows, and I think it was apparent from his appearance, that he ought not to be subjected to the strain of long-continued mental work connected with this matter without opportunities to rest; at least, it would be hard for him. But in that respect, the manner of trial can be conducted so as to obviate any severe strain, by not having very long sessions in a day. It is not clear to me that he will be in any better condition six months from now than he is now. I do not think the showing makes that clear. I think the motion should be denied."

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The case was then set for trial on June 21st. On that day a motion for a continuance was again made, reinforced by the same and other similar affidavits. That motion was heard by Judge Morris, who then presided, and was denied by him for the reasons stated by Judge Lochren. On June 22d, after an unsuccessful challenge of the panel of petit jurors, the trial began. On June 30th the government closed its case, when, after an unsuccessful demurrer to the evidence, the further hearing was continued to July 5th. After the verdict a motion for a new trial was made, and the court's attention again called to the defendant's physical condition and inability to properly prepare for trial as important grounds of the motion.

We are impressed by the careful and repeated consideration given to defendant's application by the trial court that the judges acted with great deliberation and consideration for defendant, and decided adversely to him out of a deep sense of the demands of public justice, as well as with due regard for his own welfare. In view of the reasons assigned for overruling the motions for continuance, the assurances then given that the trial would be conducted so as to obviate any severe strain by not having long sessions in a day, the length of the trial, the postponement of it for about a week after the government closed its evidence before the defendant was required to proceed, the refusal to grant a new trial to defendant, and the well-earned reputation for fairness and impartiality of the two district judges who acted on the respective applications for continuance, we think it is fair to presume that the trial was actually conducted with due regard to the age and physical condition of the defendant, and certainly that there was no abuse of the discretion lodged in the trial judges in denying the motions for continuance. It was held at an early day that the ruling of a trial court on an application for a continuance could not be assigned as error. Woods v. Young, 4 Cranch (U. S.) 237, 2 L. Ed. 607. The doctrine of that case has, however, been modified to the extent already indicated, that abuse of the discretion can be assigned for error.

The cases of Goldsby v. United States, supra, and Youtsey v. United States, 38 C. C. A. 562, 97 Fed. 937, present facts very similar in many of their phases to those now before us. The Supreme Court in the one case and the Circuit Court of Appeals for the Sixth Circuit in the other held that the denial of a continuance in such circumstances did not constitute abuse of discretion. Those cases, by reason of their close similarity to this, are interesting and instructive on the question now before us. In view of all the facts which we have carefully considered, and in the light of the authorities referred to, we have reached the conclusion that no error was committed in denying the motions for continuance, and that substantial justice required no postponement of the trial.

Does the indictment sustain the judgment? Defendant at the outset demurred to 10 counts of the indictment on the ground of duplicity. An examination of them discloses that they were not obnoxious to that objection. Moreover, the sentence on each of the 10 counts was the same as that imposed on each of the other 14, and all ran concurrently.

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ven if the 10 should have been held bad on demurrer, the same dgment and sentence, based on each of the other 14 counts, which d not exceed that which might lawfully be imposed on any one, nnot be disturbed for that reason. Claassen v. United States, 142 . S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966; Evans v. United States, 3 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830; Ballew v. United States, 0 U. S. 187, 16 Sup. Ct. 263, 40 L. Ed. 388; Putnam v. United ates, 162 U. S. 687, 704, 16 Sup. Ct. 923, 40 L. Ed. 1118; Peters v. nited States, 36 C. C. A. 105, 94 Fed. 127; Gardes v. United States, C. C. A. 596, 87 Fed. 172, 182.

A motion in arrest of judgment challenged the sufficiency of all the unts on the ground that they did not set forth facts constituting a blic offense. No timely demurrer was filed before the expense and ouble of a protracted trial had occurred, but after an adverse verdict e defendant for the first time raised the question of the legal sufiency of the indictment by a motion to arrest the judgment. This not good practice. It imposes an unnecessary burden in many cases on the court, upon the government, and upon the accused. It may so be prejudicial to the latter. While he may, by a motion in arst, raise the question whether the substance of the crime is charged ainst him, he may also, by delaying till after verdict, deprive himlf of advantages which he might have secured by timely application. unbar v. United States, 156 U. S. 185, 192, 15 Sup. Ct. 325, 39 L. d. 390; Rosen v. United States, 161 U. S. 30, 33, 16 Sup. Ct. 434, L. Ed. 606.

Learned counsel for defendant, in arguing the legal sufficiency the present indictment, urges us to recognize and apply the criterion the hornbooks of the law that certainty to a common intent is not fficient, but that a high degree of certainty in every particular is quired. This was anciently the fixed rule of criminal pleading, but late years its rigidity has been somewhat relaxed. The wellown canons of construction employed to ascertain the meaning of ritten instruments should not be ignored to secure mere technical curacy, when that is unnecessary for the legitimate protection of e accused. Language should not be strained either to convict or to quit; it should receive a reasonable and fair interpretation to accomish, on the one hand, the indispensable purpose of fairly apprising e accused of the charge against him, so that he may intelligently epare to meet it, and be enabled to make use of an acquittal or conction to protect himself against another charge for the same offense; d, on the other hand, to enable the government without unnecesry embarrassment to effectually enforce its laws and bring the guilty punishment. We must so far as possible, consistently with insuring accused person a fair and impartial trial, guarantied to him by the onstitution and laws, disregard form, imperfection of statement, d unimportant defects, which do not reasonably tend to the prejudice the accused. This we are commanded to do by positive law (secon 1025, Rev. St. [U. S. Comp. St. 1901, p. 702]) as well as by reated admonitions of the Supreme Court.

Mr. Justice Harlan, in the case of Rosen v. United States, supra,

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speaking for the Supreme Court concerning the meaning of our constitutional provision requiring the accused to be "informed of the nature and cause of the accusation," says as follows:

"The defendant is informed of the nature and cause of the accusation against him if the indictment contains such description of the offense charged as will enable him to make his defense and to plead the judgment in bar of any further prosecution for the same offense."

In the same case he shows that reasonable inferences should be indulged in construing the language of indictments. One of the objections to the indictment involved in that case was that the government failed to allege that the defendant knew that the matter alleged to have been mailed was obscene, etc. On this subject he observes as follows:

"The indictment on its face implies that the defendant owned or managed the paper. * * * He must have understood from the words of the indictment [that he unlawfully, willfully, and knowingly deposited and caused to be deposited the alleged obscene paper] that the government imputed to him knowledge or notice of the contents of the paper so deposited. * * * The ordinary acceptation of the words 'unlawfully, willfully, and knowingly,' when applied to an act or thing done, imports knowledge of the act or thing so done, as well as an evil intent or bad purpose in doing such thing."

He concludes that the case before him "was not one of total omission from the indictment of an essential averment, but, at most, one of the inaccurate or imperfect statement of fact."

Mr. Justice Brewer, in Dunbar v. United States, supra, was discussing a criminal offense which by law consisted of "smuggling opium prepared for smoking," but which was by the indictment alleged to consist of "smuggling prepared opium." He held in that case that by referring to the tariff schedules the words "prepared opium" could be seen to be essentially the equivalent of the words "opium prepared for smoking." He uses the following language:

"The pleader is at liberty to use any form of expression, provided only that he thereby fully and accurately describes the offense, and the entire indictment is to be considered in determining whether the offense is fully stated."

He lays down a broad general rule in the following language:

"Any words of description which make clear to the common understanding the articles in respect to which the offense is alleged are sufficient."

He then says:

"There can be no doubt that the defendant knew exactly what he was charged with having smuggled, and that the description was so precise and full that he could easily use a judgment under these indictments in bar of any subsequent prosecution."

Mr. Justice Brown, in Evans v. United States, 153 U. S. 584, 590, 14 Sup. Ct. 934, 937, 38 L. Ed. 830, says:

"While the rules of criminal pleading require that the accused shall be fully apprised of the charge made against him, it should, after all, be borne in mind that the object of criminal proceedings is to convict the guilty as well as to shield the innocent, and no impracticable standards of particularity should be set up whereby the government may be intrapped into making allegations which it would be impossible to prove."

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Likewise Mr. Justice Brown in Cochran v. United States, 157 U. S. 6, 290, 15 Sup. Ct. 628, 630, 39 L. Ed. 704, says:

"Few indictments under the national banking law are so skillfully drawn to be beyond the hypercriticism of astute counsel; few which might not be de more definite by additional allegations. But the true test is not whether night possibly have been made more certain, but whether it contains every ment of the offense intended to be charged, and sufficiently apprises the endant of what he must be prepared to meet, and, in case any other prodings are taken against him for a similar offense, whether the record ows with accuracy to what extent he may plead a former acquittal or contion."

In the light of the foregoing reasonable and practicable rules, we ve examined the several counts of the indictment in the case now fore us, and do not hesitate to say that, tested by them, every count good; in fact, the counts sufficiently state offenses within the strict e of certainty advocated by learned counsel for the defendant.

The second count, so far as it is necessary to state it to bring out points of objection to it, charges: that the defendant, while presint of the bank, made in its daily journal a certain entry in words and ures following: "Other Real Estate, A. Barton Farm, $3,350.00." at the entry purported to show, and did, in substance and effect, licate and declare, "that the south ½ of the N. W. ¼ of sec. 27, vn 109, range 22, was a certain 80-acre tract of land, and was known the 'Barton Farm,' and was an asset of the said bank in the sum of 350." That the entry so made was false in this: "That the said ıth ½ of N. W. ¼ of sec. 27, town 109, range 22, was not then d there an asset of the said bank," of the value of $3,350, or of any n whatsoever. It is argued that this count fails to charge the comssion of a criminal offense, because there is no allegation that the . Barton Farm" referred to in the entry was known or described the S. ½ of N. W. ¼ of sec. 27, township 109, range 22, or was ntical with it, and also because there is no allegation that the "A. rton Farm" was not an asset of the bank. This contention is wit merit. The count charges that the entry made by the defendant rported to show, and did in substance declare, that the land so deibed by fractions of section was known as the Barton farm, and was asset of the bank in the sum of $3,350. Afterwards the meaning the entry as so averred was falsified by the unequivocal statement t the land as so described was not an asset of the bank. It is e it is not averred in words that the "A. Barton Farm" was known described as the S. ½ of N. W. ¼, etc.; neither is it averred words that the "A. Barton Farm" was not an asset of the bank, t it is averred that the described land which was by the accused clared in his false entry to be the "A. Barton Farm" and to be an set of the bank was not such an asset. We cannot perceive any subntial difference between an averment that the described land was own as the Barton farm and was an asset of the bank and an averent that the Barton farm was known as the described land and was asset of the bank. There can be no doubt the accused well knew th what he was charged. The fair meaning of the charge is that e Barton farm was known to be the same thing as the described

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land, and that it, under that name or otherwise, was not an asset of the bank. This certainly would so appear to the common understanding, and that is sufficient.

There is no specification found in defendant's brief of reasons why the third count does not state an offense, and we, after careful scrutiny of it, fail to find any.

The fourth count charges that the defendant, while acting as president of the bank, made another false entry in a report to the Comptroller of the Currency, showing the condition of the bank at the close of business on the 9th of June, 1904; that the false entry in that report was in the words and figures following: "Lawful Money Reserve in Bank, Specie viz.: Gold Coin, $23,955.00." The averment is then made that the false entry purported to show, and did, in substance and effect, show, that the sum of $23,955 in gold was in the actual possession of the bank at the close of business on the evening of June 9, 1904, as a part of its lawful money reserve. It is then averred that that entry was false in this: That on the 9th day of June, 1904, the bank had only the sum of $21,955.00 of gold coin as lawful money reserve. It is argued that this count fails to state a criminal offense for want of an allegation that the lawful reserve exceeded the sum of $21,955. This, in our opinion, is not a sound criticism. It is not an offense in purview of section 5209, and certainly not the offense charged in this indictment, for a national bank to have more or less gold on hand than that which equals the required reserve. The offense consists in making a false entry in a report. The Comptroller requires certain reports from national banks in order to show their true condition. As a matter of practice he indicates in blanks, furnished to the banks by him, what facts he wishes information about; and one of them is the amount of gold coin on hand constituting the lawful money reserve. His discretion and his subsequent action largely depend upon the truth of such reports and the facts disclosed thereby. Their falsity alone constitutes the gist of the offense.

It is next urged that the allegation that the entry was made in the report "with intent to deceive the Comptroller of the Currency and any agent who might be appointed to examine the affairs of the bank" was immaterial. That is quite correct so far as the allegation concerning the intent to deceive the Comptroller is concerned. Such intent is not one of those requisite under section 5209 to constitute an offense. But the contention is not correct in so far as the allegation relates to the intent to deceive an agent who might be appointed to examine the affairs of the bank. The act in terms contemplates the appointment of such agents as specifically provided for by section 5240, Rev. St. [U. S. Comp. St. 1901, p. 3516], and, although the report is made to the Comptroller, yet if the intent in making a false entry is to deceive an examiner who, every officer of a bank knows, may be appointed to make an examination for the information of the Comptroller, it is sufficient by itself to constitute an offense, irrespective of the existence of any of the other intents disjunctively mentioned in the act. United States v. Allis (C. C.) 73 Fed. 165;

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McKnight v. United States, 38 C. C. A. 115, 97 Fed. 208. We think the fourth count sufficiently states a criminal offense.

The objection to the fifth count is the same as that made to the fourth, and needs no further consideration.

The sixth and seventh counts charge the defendant with having misapplied funds of the bank by drawing against them two drafts (one for $10,000 and the other for $8,250) in favor of one Rogers, with intent to injure and defraud the bank, and to convert the proceeds of the drafts to the use of Rogers and other persons to the grand jury unknown. The counts clearly state offenses, and it is so admitted by defendant's counsel in his brief. His only objection to the conviction under them relates to the sufficiency of the evidence to support them. The eighth and subsequent counts charge false entries and misapplication of funds in favor of the Minnesota Lumber Company. The objection to them is that their allegations lack the required degree of certainty. A careful examination convinces us that they are not obnoxious to that objection.

Does the proof sustain the conviction? We have carefully examined all the evidence bearing on the several counts on which the defendant was found guilty, and unhesitatingly conclude that the verdict on each and all of them is well sustained by the proof adduced; but, in view of the rule applicable to this case, already adverted to, we shall, for the purposes of this opinion, confine our treatment of the evidence to that bearing on the sixth and seventh counts only. These counts charge the misapplication of $10,000 and $8,250, respectively, by the process of defendant's drawing drafts on depositories of his bank in favor of A. C. Rogers, and thereby permitting him and others to appropriate those sums of money to their own purposes, without any consideration moving to the bank therefor. The evidence tending to support the verdict on these counts is substantially as follows: The De Soto Fruit, Agricultural & Manufacturing Company was a corporation organized and existing under the laws of the state of Georgia. It does not appear what its capital was, but it does appear that only 93 shares, of the par value of $100 per share, had been issued. Clement personally owned 90 of these shares. Conceding them to have been paid in full, as to which there is no evidence, the company had only $9,300 of capital. It authorized an issue of bonds aggregating $100,000, secured by deed of trust conveying to trustees "all and singular its real and personal property in said state"; but what that real and personal property consisted of does not appear. The bonds were issued and delivered to the Royal Trust Company of Chicago, it being one of the trustees named in the deed of trust required to certify something (probably that the title to the real estate conveyed was clear, but this does not distinctly appear), and to deliver the bonds upon the order of A. C. Rogers, who was the president of the De Soto Company. Rogers does not appear to have owned any stock of the De Soto Company, and could not possibly have owned over three shares, as the balance belonged to Clement. He gave Clement an order in writing upon the trust company, requesting it to certify and deliver all the bonds to him. This the trust company

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declined to do until a certain incumbrance, amounting to $18,250, upon the real estate of the De Soto Company should be extinguished. Thereupon Clement, acting as president of the Faribault bank, drew the two drafts mentioned in the fifth and sixth counts of the indictment, aggregating $18,250, upon its correspondents in New York and Chicago, which had funds of his bank sufficient to meet them. The drafts were payable to the order of Rogers, who had no money or funds to his credit in the Faribault bank. Neither he nor Clement nor any one else paid the bank anything for the drafts. Rogers at the request of Clement took the drafts to Cincinnati, and with them, or their proceeds, extinguished the incumbrance held by a trust company located there. Thereafter the Royal Trust Company certified and delivered the entire issue of $100,000 bonds to Clement, on the order which he had formerly secured from Rogers. No record or entry of any kind was made in the books of the bank concerning the drawing of the drafts, except what appeared on the stub of the draft book, until 10 days after they were drawn; when on January 30, 1904, Clement "caused to be entered on the books of the bank as its assets $30,000 face value of the bonds of the De Soto Company, and as an offset against the same charged the bank with the said sum of $18,250." The evidence does not show that Clement ever in fact delivered any such bonds to the bank, unless that fact may be implied from the quotation just made. It may, however, be assumed for the present purposes that it was done.

The following further facts appear by the proof: The balance of the issue of bonds by the De Soto Company, $70,000 in face value, were on February 20, 1904, delivered by defendant to the bank to balance its account occasioned by Clement's discounting for the benefit of the Minnesota Lumber Company certain drafts claimed by the government, and found by the jury in its verdict on other counts to be bogus, amounting to $68,270. The bank failed, and was taken in charge by a receiver appointed by the Comptroller on January 3, 1905. Its funds were actually depleted by the payment of the two drafts in question in the full amount of their face value, namely, $18,250.

Rogers appears from the foregoing to have been only a tool of Clement, financially irresponsible, but willing to do his bidding. The aspect of this case most favorable to the defendant is that he, without authority from his board of directors or other officers, used about $100,000, including the $18,250 involved in counts 6 and 7 of the indictment, of the money of his bank, either for his own benefit or that of his friends, and after doing it undertook to thinly disguise his wrongful purpose by delivering to his bank, unsolicited, and, so far as this record shows, undesired by it, $100,000 in face value of bonds of a corporation organized in Georgia, with a capital of $9,300 only, all of which was probably invested in lands of unknown and doubtful value. The value of these bonds, even if delivered by Clement to his bank for the purpose of satisfying its claim against him for moneys taken by him, amounted to nothing in fact. The proof shows that the funds of the bank were by reason of the two drafts in question actually depleted to the full extent of the face value of the drafts.

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/e are seriously asked to say that this evidence, taken in connection ı all reasonable inferences deducible from it, and taken in connec- with the fact disclosed by the judgment below that Clement was aged at or about the same time in similar transactions involving e entries and misapplications of other funds of the bank, does not ort the verdict of guilty rendered on the fifth and sixth counts; it might be evidence of bad judgment or maladministration of a t, but no further. To this we cannot consent. In our opinion evidence discloses a corrupt purpose on the part of Clement to will- misapply the funds of the bank, and great success in accomplish- his purpose. It is altogether sufficient, not only to justify the con- ion on the counts under consideration, but to imperatively require The offense of misapplication denounced by section 5209 of the ised Statutes consists "in the conversion to his own use or to the of some one else of the moneys and funds of the bank by the party rged." United States v. Briton, 107 U. S. 655, 666, 2 Sup. Ct. 27 L. Ed. 520. If the facts of this case do not respond to the nition of the crime just given, we are unable to conceive of those would.

ome other questions require consideration. The government at the et of the case produced proof showing the original incorporation organization in 1868 of the First National Bank of Faribault under provisions of the act of June 3, 1864 (chapter 106, 13 Stat. 99), and r offered the original certificate, signed by the deputy and acting ptroller with the seal of the Comptroller impressed upon it, certi- g to the extension of its corporate existence under the provisions ne act of July 12, 1882 (chapter 290, 22 Stat. 162 [U. S. Comp. St. l, p. 3457]), until November 21, 1908. This was objected to for ral reasons: First. Because no preliminary showing was made of consent of the requisite number of stockholders to the extension, or ther prerequisite facts found in section 2 of the act of 1882. This ction was without merit. The certificate of the Comptroller was to effect that the bank had complied with all the provisions of the act uly 12, 1882, to enable it to extend its corporate existence, and in ıs it certified that the bank was authorized to have succession until ember 21, 1908. Such a certificate, under powers conferred upon Comptroller of the Currency by the act of 1882, is conclusive evi- ce, in a case like this, of compliance by the bank with all necessary equisite conditions. Casey v. Galli, 94 U. S. 673, 24 L. Ed. 168,

n objection to the introduction of the certificate was also made ıuse it was not shown to have been physically accepted or received he bank. The bank continued its existence, performing the func- s of a national bank, after the expiration of its original corporate tence. It will be presumed to have accepted the benefit conferred he certificate in its favor, and to have acted under the authority of only instrument which entitled it to act at all.

: was also objected, that the certificate was signed by the deputy acting comptroller and not by the Comptroller himself. That is ıaterial. Keyser v. Hitz, 133 U. S. 138, 10 Sup. Ct. 290, 33 L. Ed. It was also objected that there was no proof of the authenticity



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of the certificate. The seal of the Comptroller was impressed upon it, and we take judicial knowledge of what that seal is. It is in daily use, authenticating many of the most important financial transactions of the executive department of our government. See Pierce v. Indseth, 106 U. S. 546, 549, 1 Sup. Ct. 418, 27 L. Ed. 254, for analogous case. Moreover, the regular and constant enforcement of the laws providing for supervision by the Comptroller over national banks, the frequent reports from and examinations of such banks, and the proof of the actual performance by the Faribault bank of the functions of a national bank for 15 years or more after the certificate of extension was given, afford full recognition of the authenticity of the certificate in question. There was no error in overruling any or all of the objections to the introduction of the certificate.

Error is assigned of certain rulings on evidence, refusal by the District Court to charge the jury as requested, and to portions of the charge as made. To these we have given that diligent and careful attention required by the gravity of this case, and, in view of the rule that a lawful judgment and sentence pronounced without error on any one count requires the affirmance of the judgment even if error was committed in respect of other counts, we refrain from the unprofitable detail necessarily involved in discussing the challenged rulings on the materiality and competency of evidence, the exceptions to instructions refused, and to the charge as given by the court. It is sufficient to say that in our opinion the conviction on the second, third, sixth, and seventh counts was unaffected by any possible irrelevant or incompetent testimony challenged by defendant's counsel; that as to them no prejudicial error was committed by the court in refusing to instruct in the language as requested or in the charge as given. The charge as a whole was fully as favorable to the defendant as the case warranted, and presented every proper and lawful consideration conducing to his acquittal. We are impressed by the record as a whole that he was given a fair and impartial trial, and that his guilt was established beyond any reasonable doubt. The judgment should therefore be affirmed, and it is so ordered.

SANBORN, Circuit Judge (concurring). In my opinion there was no evidence to sustain the verdict on the second count of the indictment, there was fatal error in the charge of the court relative to the trial of the third count, and I am unable to assent to the view that the defendant was lawfully convicted upon any count in the indictment except the sixth and seventh. I concur in the judgment of affirmance upon the sole ground that there was substantial evidence in support of the verdict of guilty on these two counts, and that the record fails to disclose any material error in the trial of the charges they set forth.

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## BRYANT BROS. CO. v. ROBINSON.

(Circuit Court of Appeals, Fifth Circuit. December 31, 1906.)

No. 1,543.

REMOVAL OF CAUSES—SUITS AGAINST FEDERAL OFFICERS.

Where suit was brought in a state court against defendant as "the duly qualified and acting postmaster at Dallas, Tex.," and sought relief against certain official acts performed by the defendant under orders of the Postmaster General, it was a suit against an officer of the United States in his official capacity, and removable to the federal courts, under Act Cong. Aug. 13, 1888, c. 866, § 2, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], authorizing the removal of cases arising under the laws of the United States of which the Circuit Courts of the United States are given original jurisdiction by section 1.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 49.]

SAME—PROCEDURE.

The proper procedure for removing a cause from a state to a federal court as authorized by act Cong. Aug. 13, 1888, c. 866, §§ 1, 2, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], is for the defendant to file a petition for removal in the state court, together with a bond conditioned that the defendant will enter in the federal Circuit Court on the 1st day of its next session, a transcript of the record from the state court, and will pay costs awarded in case it shall be determined that the suit has been wrongfully removed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, §§ 165, 189.]

SAME—REMAND.

Act Cong. March 3, 1875, c. 137, § 5, 18 Stat. 472 [U. S. Comp. St. 1901, p. 511], provides that when a case is removed from a state court to a Circuit Court of the United States, it shall be remanded whenever it shall appear to the satisfaction of the Circuit Court at any time after removal that the suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of such Circuit Court. *Held* that, where a cause was properly removable, and was actually removed, it would not be remanded because of an irregularity in the proceedings for removal or because such proceedings were taken under the improper statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 221.]

SAME—PROCEEDINGS AFTER REMOVAL.

Rev. St. § 643 [U. S. Comp. St. 1901, p. 521], provides that after removal of a cause from a state to the federal courts, it shall proceed as a cause originally commenced in the federal court. Section 914 [U. S. Comp. St. 1901, p. 684] declares that the practice, pleadings, forms and modes of civil procedure other than equity and admiralty causes in the federal and District Courts shall conform as near as may be to the practice in the state courts, and section 913 [U. S. Comp. St. 1901, p. 683] requires that the forms and modes of procedure in suits in equity shall be according to the rules and usages which belong to courts of equity and to rules of court made in conformity to law. *Held*, that where a suit in equity is removed from a state to a federal court, it must thereafter conform to the equity practice and rules in force in such court, regardless of the forms of practice in equitable proceedings in the state court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 246.]

EQUITY—PLEADING—DEMURRER—CERTIFICATE OF COUNSEL—AFFIDAVIT.

A demurrer to a bill not accompanied by a certificate of counsel that it was well founded in point of law, nor supported by the affidavit of the

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defendant that it was not interposed for delay as required by equity rule 31, was fatally defective.

[Ed Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 613, 627.]

6. SAME—ANSWER—FILING—TIME.

Equity rule 32 authorizes a defendant to demur to a part of the bill and answer as to the residue, and rule 37 declares that no demurrer or plea shall be held bad and overruled only because the answer of the defendant may extend to some part of the same matter covered by such demurrer or plea. *Held*, that a defendant was not entitled to file a demurrer and answer at the same time both attacking the entire bill, and that the simultaneous filing of such answer operated as a withdrawal of the demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 488.]

7. COURTS—FEDERAL COURTS—EQUITY RULES.

Equity rules adopted by the federal courts, as authorized by Rev. St. § 917 [U. S. Comp. St. 1901, p. 684], have the force and effect of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 274, 294, 911.]

Appeal from the Circuit Court of the United States for the Northern District of Texas.

This suit was begun by the plaintiff, Bryant Bros. Company, a corporation organized under the laws of Texas, filing its petition in a district court of Dallas county, Tex., against the defendant, D. A. Robinson, the duly qualified and acting postmaster of Dallas, Tex. The petition was verified by plaintiff's affidavit, and its allegations are substantially as follows: That plaintiff was engaged in the business of selling a mineral rod, which was a legitimate article of commerce, and which had been thoroughly tested many times and found efficient; that plaintiff's business as a seller of said rods yielded it a net revenue of about $5,000 per annum, the average selling price of the rods being about $8, and the average profit being about $3 each rod; that plaintiff and its predecessors had been engaged in the business at Dallas for about eight years, during which time they always had been solvent and responsible financially, and never had been sued or otherwise disturbed by persons who had purchased rods; that plaintiff had been summoned to appear before the Assistant Attorney General for the Post Office Department at Washington, to show cause why a fraud order should not issue against it; that it had appeared before said Assistant Attorney General of the Post Office Department, and had filed its answer and introduced evidence, both of which showed without contradiction that plaintiff was not using the mails for the conduct of a scheme devised to defraud; that the evidence offered by the plaintiff was all the evidence produced on the hearing; that the Assistant Attorney General never had before him any other evidence than that introduced by the plaintiff (all the evidence aforesaid being attached as exhibits to the petition); that the Assistant Attorney General, whose name was R. P. Goodwin, made the order without any evidence proving or tending to prove that the plaintiff was engaged in a scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, representations, or promises, and that the order was made by the said R. P. Goodwin, but was signed by George B. Cortelyou, Postmaster General, who had never heard nor considered any evidence bearing on the fact as to whether or not the plaintiff had been conducting a scheme or device for obtaining money through the mails by false or fraudulent pretenses, representations, or promises; that the order so made was what is usually known as a "fraud order," the bill setting up the terms and legal effect of the order; that plaintiff's business was largely conducted through the post office, and could not be conducted successfully without using the mail and postal facilities; that the defendant, as postmaster, was enforcing said order; that letters containing checks, drafts, money orders, and money, addressed to the plaintiff, had been detained, and were then being held in the post office at Dallas, and would within a few days be returned by the postmaster to the senders with the envelopes marked

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Fraudulent," the effect of all of which would be to destroy the business of ie plaintiff.

An injunction was granted by the state judge. The defendant presented is petition to the United States Circuit Court for the Northern District of exas, in which he described the suit which had been brought against him, nd alleged that the suit for injunction seeks "to restrain him from perform- g his duties as the postmaster of the United States of America, at Dallas, ex., to wit, his duty and duties under the laws and regulations of the ost Office Department of the United States of America, which said laws and gulations are a portion and a part of the revenue laws of the said United tates government, and to prevent him, as aforesaid, from carrying into fect the lawful orders of the said George B. Cortelyou, Postmaster General the United States, as aforesaid, which said orders were made under the ws of the United States of America; that all of the acts sought to be strained and enjoined in the said suit are the acts and duties required of this titioner as the said officer of the United States of America, and under color his said office, and by authority of the said postal laws of the United ates of America." The defendant concluded his petition with a prayer that e suit be removed from the state court to the Circuit Court. The cause ving been removed to the Circuit Court, a motion was made by the plain- ff to remand it to the state court. The Circuit Court overruled this motion. fterwards, a final decree was made, sustaining demurrers to the bill, and e bill was dismissed. The plaintiff appealed to this court. A further state- ent of the procedure in the cause appears in the opinion.

J. M. McCormick, for appellant.

Wm. H. Atwell, U. S. Atty., for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge (after making the foregoing statement of e case).

We first consider the assignment that the court erred in refusing remand the cause to the state court. The petition beginning the it in the state court shows that it was brought against the defendant s the duly qualified and acting postmaster at Dallas, Tex." The lief sought is against certain official acts of the postmaster performed him under the orders and directions of the Postmaster General. It a suit against an officer of the United States, and the official char- ter of the defendant appears from the plaintiff's petition. The first ction of the act of August 13, 1888, confers jurisdiction on the rcuit Courts of the United States, concurrent with the courts of the veral states, of all suits of a civil nature, at common law or in equity, here the matter in dispute exceeds, exclusive of interest and costs, e sum or value of $2,000, and arising under the Constitution or laws the United States. It is provided by the second section of the me act that any suit of a civil nature, at common law or in equity, ising under the Constitution or laws of the United States, of which e Circuit Courts of the United States are given original jurisdiction the preceding section, may be removed by the defendant or the fendants therein to the Circuit Court of the United States for the oper district. Act Aug. 13, 1888, c. 866, 25 Stat. 433, 1 Rev. St. Supp. d Ed.) p. 611 [U. S. Comp. St. 1901, p. 508]: A suit against an of- er of the United States for acts done in the performance of official ties is a case arising under the laws of the United States. Bachrack Norton, 132 U. S. 337, 10 Sup. Ct. 106, 33 L. Ed. 377; Sonnentheil

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v. Christian Moerlein Brewing Co., 172 U. S. 401, 19 Sup. Ct. 233, 43 L. Ed. 492. The case was, therefore, clearly removable under this statute. Feibelman v. Packard, 109 U. S. 421, 3 Sup. Ct. 289, 27 L. Ed. 984; Eighmy v. Poucher (C. C.) 83 Fed. 855; New Orleans National Bank v. Merchant (C. C.) 18 Fed. 841; Black's Dillon on Removal of Causes, § 124. The proper procedure for removal under this act was for the defendant to file a petition in the suit in the state court, and to file a bond with surety, with condition for his entering in the Circuit Court on the 1st day of its next session a transcript of the record from the state court, and for the payment of costs that may be awarded by the Circuit Court if that court should hold that the suit was wrongfully removed. It does not appear from the record that the defendant filed any such petition or bond in the state court. The record shows that he made application to the federal court under section 643 of the Revised Statutes [U. S. Comp. St. 1901, p. 521] and under the provisions of that section obtained the removal of the cause. Although no petition was filed in the state court, that court, on receiving notice of the proceeding in the federal court to remove the cause, made the following order:

"It is ordered by the court that the above-styled and numbered cause be removed to said United States court, and the clerk is directed to transmit the filed papers, together with copies of all orders made by this court in said cause, or a transcript of the same, and together with a bill of all costs incurred in said cause in this court, duly certified. * * *"

Pursuant to this order of the state court, a transcript of the record in the case was duly filed in the Circuit Court. The plaintiff moved the Circuit Court to remand the case to the state court, contending that it appeared from the record that the cause was not removable under the provisions of section 643 of the Revised Statutes. The Circuit Court refused to grant this motion, and its refusal is assigned as error.

Section 643 of the Revised Statutes provides that:

"When any civil suit or criminal prosecution is commenced in any court of a state against any officer appointed under, or acting by authority of any revenue law of the United States, now or hereafter enacted, or against any person acting under or by authority of such officer on account of any act done under color of his office, or of any such law, on account of any right, title or authority claimed by such officer, or other person under such law * * * the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial in the Circuit Court," etc.

The cause was properly removable under this section if the postmaster can properly be called an "officer appointed under, or acting by authority of any revenue law of the United States." It is said in Black's Dillon on Removal of Causes, § 41, that "the post office laws of the United States are 'revenue laws,' within the meaning of this statute." In Warner v. Fowler, 4 Blatchf. 311, Fed. Cas. No. 17,182, a suit against a postmaster for an alleged wrongful refusal to deliver a letter to the plaintiff was held removable under this statute, the court deciding that the post office laws of the United States are "revenue" laws within its meaning. In Ward v. Congress Const. Co., 99 Fed. 598, 39 C. C. A. 669, it was held that a corporation, in the performance of a contract made with the Secretary of the Treasury for the build-

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g of an addition to a post office authorized by an act of Congress, a person acting by authority of a revenue officer of the United States, ven under color of his office; and a suit in the state court against the rporation to enjoin the building of such addition is removable into e Circuit Court of the United States, under Rev St. § 643. The urt said: "The provision of section 643 for the removal of causes s been liberally construed, as, for manifest reasons, it should be," d Warner v. Fowler, supra, is quoted and approved. In United ates v. James, 13 Blatchf. 207, Fed. Cas. No. 15,464, it was held at "while the post office laws are revenue laws, within the meaning of e statute cited, they are not laws for raising revenue, within the proion of the Constitution."

There is no decision of the Supreme Court decisive of the question to whether this cause is removable under section 643. In Public earing House v. Coyne, 194 U. S. 497, 506, 24 Sup. Ct. 789, 48 L. l. 1092, the Supreme Court speaks of the Post Office Department as t being "a necessary part of the civil government in the same sense which the protection of life, liberty, and property, the defense of e government against insurrection and foreign invasion, and the adnistration of public justice, are; but is a public function assumed d established by Congress for the general welfare, and, in most untries, its expenses are paid solely by the persons making use of its cilities; and it returns, or is presumed to return, a revenue to the vernment, and really operates as a public and efficient method of taxon." United States v. Norton, 91 U. S. 566, 23 L. Ed. 454, is cited an authority against the application of the statute to this case. It lds that the act entitled "An act to establish a postal money-order stem," approved May 17, 1864, c. 87, 13 Stat. 76, is not a revenue v within the meaning of the act entitled "An act in addition to the entitled 'An act for the punishment of certain crimes against the ited States,'" approved March 26, 1804, c. 40, 2 Stat. 290. United ates v. Hill, 123 U. S. 681, 8 Sup. Ct. 308, 31 L. Ed. 275, contains pressions which confine the phrase "revenue law," when used in conction with the jurisdiction of the United States courts, to laws imsing duties on imports or tonnage, or a law providing in terms for venue; but the case is one in which the question before the court s whether a clerk of a court, not a United States officer, but a per n appointed by a court independent of the executive department of e government, who was bound to pay his surplus earnings into the ited States Treasury, was a revenue officer; and the question was cided in the negative.

The contention in behalf of the motion to remand is that section 643 ates only to laws providing in terms for revenue—laws traceable rectly to the constitutional power granted to Congress to levy and llect taxes, duties, imposts, and excises, and that it has no applicaon to laws passed under the authority conferred on Congress to eslish post offices and post roads. Const. art. 1, § 8. Counsel for e defendant in error, in United States v. Bromley, 12 How. 88, 96, 13 Ed. 905, urged the same limitation upon the meaning of "revenue w," and pointed out that the constitutional source of power to pass

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postal laws was separate and distinct from that to pass revenue law Responding to that contention, the court said:

"That the act which prescribes the offense charged is a revenue law, the would seem to be no doubt. In its title, it is declared to be an act to redu the rates of postage, and for the prevention of frauds on the revenue of t Post Office Department. In its character and object it is a revenue law, as acts upon the rates of postage and increases the revenue by prohibiting a punishing fraudulent acts which lessen it. Under the act of 1836, the reven of the Post Office Department is paid into the Treasury. Revenue is the i come of a state, and the revenue of the Post Office Department, being rais by a tax on mailable matter conveyed in the mail, and which is disburs in the public service, is as much a part of the income of the government moneys collected for duties on imports."

This language strongly indicates that postal laws may be revenu laws within the meaning of section 643, but the expressions we ha quoted from United States v. Hill, supra, may point to a different co clusion.

When the Circuit Court was moved to remand the case, the motio we think, involved more than the mere question as to whether or n the cause was removable under section 643. When a case is remove from a state court to a Circuit Court, it should be remanded to t court from which it was removed whenever "it shall appear to t satisfaction of said Circuit Court, at any time after such suit has bee * * * removed thereto, that such suit does not really and substa tially involve a dispute or controversy properly within the jurisdictio of said circuit court. * * *" Act March 3, 1875, c. 137, § 5, 1 Stat. 472 [U. S. Comp. St. 1901, p. 511]. It appears from the reco that the case does substantially involve a dispute or controversy pro erly within the jurisdiction of the Circuit Court. The difficulty as to the regularity of its removal. If a petition had been filed in t state court in due form, accompanied by the proper bond, and t transcript of the cause filed in the Circuit Court, the jurisdiction of t Circuit Court would have attached, although the state court had r fused to make the proper order. Kern v. Huidekoper, 103 U. S. 48 26 L. Ed. 354; Mo. Pac. Ry. Co. v. Fitzgerald, 160 U. S. 556, 579, 1 Sup. Ct. 389, 40 L. Ed. 536. The record does not show the filing a petition and the giving of a bond, but it does show that the sta court made an order that the case be removed to the Circuit Court, a that the transcript was duly filed in the Circuit Court.

In Osgood v. Chicago D. & V. R. Co., 6 Biss. 330, Fed. Cas. N 10,604, it was held by Drummond, Circuit Judge, that a case is to remanded only "when it shall appear to the satisfaction of the feder court that the suit does not really and substantially involve a dispu or controversy properly within the jurisdiction of the court, or that t parties have been improperly or collusively made, or joined, for t purpose of creating a case cognizable under the act. It is true th the act prescribes the manner in which the removal shall be made, a the directions that the law should be complied with. But the fifth se tion does not authorize the court to remand or dismiss the cause for t reason that it may appear that there was any irregularity in the mea taken to procure the removal. The purpose obviously was, if the re

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rd was filed in the federal court under the law, and the court could e that it had jurisdiction of the case, that it should retain it, notwithanding there might be defects in the manner of removal."

In Ruckman v. Ruckman (C. C.) 1 Fed. 587, 591, the court said:

"The question in this court is not whether the counsel for the petitioners mprehends and assigns the true reasons for the removal, but whether the hole record reveals a case over which the court has jurisdiction. No matter w irregularly the petition brings up the suit, when it is here, the only estion is whether it involves a controversy properly within the jurisdiction the court. If it does, it will not be remanded because a mistake is made the counsel of the petitioners in assigning grounds for the removal which ove to be untenable."

In Northern Pacific Terminal Company v. Lowenberg (C. C.) 18 ed. 339, 343, Judge Deady said:

"Besides, the case having been brought here, the question upon the motion remand is not whether there are any irregularities in the proceedings for moval, but whether on the face of the record it satisfactorily appears that e action does not involve a controversy within the jurisdiction of this urt. That there is such a controversy in this case is too plain for argument; d therefore the right of the petitioners to have this cause remain within e jurisdiction of this tribunal for trial is clear beyond cavil or doubt."

In Dennis v. County of Alachua, 3 Woods, 683, Fed. Cas. No. 791, it was held that:

"When a cause is once removed from a state to a federal court, and there e no jurisdictional objections to its remaining there, it will not be remanded dismissed for defects in the bond for removal, insufficiency of sureties ereon, or other irregularities which can be remedied or have not worked any ejudice to the opposite party."

In Woolridge v. McKenna (C. C.) 8 Fed. 650, 667, Judge Hamond said:

"There seems to be the recognition of a general principle that where a use has been removed and falls within the act of Congress, it will not be manded for irregularities which can be remedied and have worked no jury to the adverse party."

Where there is substantial doubt about the jurisdiction of the Circuit Court, it has been often held that it should be solved against the risdiction and that the cause should be remanded (State v. Bradley C. C.] 26 Fed. 289, 18 Ency. Pldg. & Prac. p. 378, note 5, and cases ere cited); but where there is no doubt about the case being one of hich the Circuit Court has jurisdiction, and the only doubt is as to e regularity of the removal, or as to whether the application for reoval has been made under the proper statute, the motion to remand ould be overruled. We think the Circuit Court ruled correctly in fusing to remand the cause.

We now consider the assignment that the court erred in sustaining e demurrers to the bill. The record from the state court was filed the Circuit Court on December 28, 1905. The respondent, David . Robinson, on January 8, 1906, filed in the Circuit Court three demurrers to the whole bill, and an answer to the whole bill. Each demurrer and the answer is signed by respondent's solicitor, but no certificate of counsel nor affidavit of respondent is attached to the demurers. The cause having been removed to the federal court, its further

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progress was governed by the law of that court. Ex parte Fisk, 113 U. S. 713, 726, 5 Sup. Ct. 724, 28 L. Ed. 1117. The statute under which the application to remove the case was made provides that, after its removal it "shall proceed as a cause originally commenced in that court." Rev. St. U. S. § 643.

The practice, pleadings, forms, and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts are made to conform as near as may be to the practice in the state courts. Rev. St. U. S. § 914 [U. S. Comp. St. 1901, p. 684]. The section of the statute just cited expressly excludes equity cases from its operation, and the exclusion is emphasized by the preceding section, which provides that the forms and modes of proceedings in suits of equity jurisdiction shall be according to the rules and usages which belong to courts of equity and to rules of court made in conformity to law. Rev. St. U. S. § 913 [U. S. Comp. St. 1901, p. 683]. While the practice in cases at law in the federal courts follows as near as may be that of the state in which a federal court is held, the practice and procedure in equity cases in the federal courts, being governed by federal law and uniform rules, is the same, no matter in which state the court is sitting. 1 Bates, Eq. Proc. § 20.

The thirty-first rule in equity provides that:

> "No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant; that it is not interposed for delay; and, if a plea, that it is true in point of fact."

In National Bank v. Insurance Company, 104 U. S. 54, 26 L. Ed. 693, it was held that a plea that did not conform to this rule could be "disregarded on that account." In Sheffield Furnace Co. v. Witherow, 149 U. S. 574, 576, 13 Sup. Ct. 936, 37 L. Ed. 853, the court said that:

> "Inasmuch as the so-called demurrer was fatally defective in lacking the affidavit of defendant and certificate of counsel, required by rule 31, there was no error in disregarding it, and entering a decree pro confesso."

Referring to demurrers that did not conform to the rule, Judge Maxey said, in Preston v. Finley (C. C.) 72 Fed. 850, 854, "the demurrers, as such, cannot be regarded;" and in American S. & W. Co. v. Wire Drawers' & Die Makers Unions etc. (C. C.) 90 Fed. 598, Judge Hammond said, of such a demurrer, that "it must be wholly disregarded." See, also, Secor v. Singleton (C. C.) 9 Fed. 809.

In Brazoria County v. Youngstown Bridge Co., 80 Fed. 10, 25 C. C. A. 306, the irregularity in the demurrer was held waived by the complainants going to trial on it without objection. In that case there was an affidavit of counsel that the demurrer was not interposed for delay. Whether the affidavit of counsel would be received as a substitute for the affidavit of the defendant and the certificate of counsel, was mooted, but not decided; but it was held that the defect was waived. In the case at bar, there is no effort whatever to comply with the rule; and, besides, here, unlike the case just cited, the defendant has attached to his demurrer to the whole bill an answer to the whole bill. Foster says that, by setting the demurrer down for argu-

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ment, any irregularity in filing it would probably be waived, "except the omission of the affidavit and certificate of counsel." 1 Foster's Fed. Prac. (3d Ed.) § 119. A defendant may demur to part of a bill and answer part of it (Equity rule 32), but he is not permitted to demur to the whole bill and at the same time answer the entire bill. When such pleadings are filed, the effect of the answer is to overrule or withdraw the demurrer, and the answer alone should be regarded. 1 Bates Fed. Eq. Proc. § 207; Story's Eq. Pldg. § 442; 6 Ency. Pldg. & Prac. p. 38, § 3. It was formerly the rule that an answer to any part of a bill demurred to would overrule the demurrer, even though the part answered was immaterial. 1 Daniell's Chan. Pldg. & Prac. (4th Ed.) 589. The severity of that rule, operating against a defendant who in framing his answer to part of the bill made it inadvertently extend to parts of the bill to which he had demurred, caused it to be abandoned in this country and in England.

The practice which now prevails is prescribed by Equity rule 37:

> "No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea."

Construing this rule in Crescent City, etc., v. Butchers', etc. (C. C.) 12 Fed. 225, Pardee, Circuit Judge, said:

> "We notice that with the demurrer to the whole bill and four separate pleas, each going to the whole bill, there is also filed an answer to the whole bill, in which all the matters averred in the pleas are again set forth. Under the equity rule 32, a defendant may demur to part of a bill, plead to part, and answer as to the residue. Under the equity rule 37, no demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea. But we do not understand that there is any rule that allows a defendant to demur to the whole bill, plead to the whole bill, and answer to the whole bill at the same time. The effect of such pleading is that the plea is taken as waiving the demurrer, and the answer as waiving the plea."

In Huntington v. Laidley (C. C.) 79 Fed. 865, Goff, Circuit Judge, held that "a plea containing a full defense to the bill is waived by an answer which goes to the whole bill." And the learned judge held that rule 37 "only applies in cases where the demurrer or plea extends to only a part of the bill, and the answer is intended to cover the residue." We are aware of the fact that the rule was given a more extended application in Hayes v. Dayton (C. C.) 18 Blatchf. 425, 8 Fed. 702, but we think that the words of the rule, construed in connection with rule 32, prevents its application to cases where the defendant has both demurred to and answered the whole bill. There is, of course, no doubt, under the authorities, that the court below could have entirely disregarded the demurrer, and, if no answer had been filed, could have entered a decree pro confesso for the complainant. The answer being on file overruled the demurrer—even if it had complied with rule 31—and the plaintiff could have filed a replication and proceeded to take evidence under the rules. The case, however, was tried on the demurrer without objection, except that the plaintiff noted an exception to the ruling on the demurrer.

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The question is, whether or not this court should notice on this ap peal the fatal defect in the demurrer and its withdrawal, waiver, o overruling by the answer which was filed with it. The answers an demurrers were framed in accordance with the practice in the stat courts of Texas, where the procedure in law cases and equity case is the same. There are fundamental objections to such practice bein adopted in federal courts, where equity cases and law cases are kep separate by law. We do not think the federal courts should permi the adoption of a state practice which involves an entire abandonmen of the law of procedure in the federal courts of equity, even whe solicitors fail to make objection. Congress has conferred power o the Supreme Court to make the equity rules we have quoted, and the have the force and effect of law. Rev. St. U. S. § 917 [U. S. Com St. 1901, p. 684]. They produce a uniformity in the equity practic that is very desirable. The rules we have cited are efficient factors i preventing frivolous demurrers being filed, and in preventing demu rers for delay. If the courts permit them to be entirely ignored, would lead to a want of uniformity in the practice and to augmentin the evils the rules were intended to suppress and prevent. The de parture from the proper procedure is so great in this case that w think it should not be permitted to pass unnoticed. It was error t sustain the demurrer and dismiss the bill.

The decree sustaining the demurrers and dismissing the bill is re versed, and the cause remanded, with instructions to entirely disregar the so-called demurrers, or to strike them from the file if motion b made for that purpose, and to proceed in the case in conformity wit the usual procedure in equity.

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(149 Fed. 330.)

## MILLER v. TERRITORY OF OKLAHOMA (two cases).

(Circuit Court of Appeals, Eighth Circuit. December 13, 1906.)

Nos. 2,398, 2,470.

1. COURTS—CIRCUIT COURT OF APPEALS—CRIMINAL APPEALS—JURISDICTION.

Judiciary Act March 3, 1891, c. 517, § 15, 26 Stat. 830 [U. S. Comp. S 1901, p. 554], provides that the Circuit Court of Appeals, in cases in whic its judgment is final, shall have appellate jurisdiction to review jud ments of the Supreme Courts of the several territories within their pa ticular circuits, etc. Section 5, as amended by Act Cong. Jan. 20, 1897, 68, 29 Stat. 492 [U. S. Comp. St. 1901, p. 549], declares that appeals o writs of error may be taken from the District Courts or existing Circu Courts direct to the Supreme Court in cases of conviction of a capit crime. Section 6 (Act March 3, 1891, c. 517, 26 Stat. 828 [U. S. Comp. S 1901, p. 549]) provides that the Circuit Court of Appeals shall have appe late jurisdiction to review any final decision in a District Court or existin Circuit Courts in all cases other than those provided for in the precedin section, unless otherwise provided by law, and that the judgments and d crees of the Circuit Court of Appeals shall be final in all cases arising u der the criminal laws, except, etc. *Held*, that the Circuit Court of A peals has jurisdiction on writ of error to review a conviction for gran

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larceny, in violation of the laws of a territory, which has been affirmed by the Supreme Court of the territory.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1101.

Jurisdiction of Circuit Court of Appeals in general, see notes to Law Ow Bew v. United States, 1 C. C. A. 6, and United States Freehold Land & Emigration Co. v. Gallegos, 32 C. C. A. 475.]

CRIMINAL LAW—WRIT OF ERROR—ASSIGNMENT OF ERROR—SUFFICIENCY.

An assignment that the court erred in not reversing a conviction on account of misconduct of the presiding judge in making prejudicial remarks, insinuations, etc., with reference to accused, his counsel, etc., as appeared from the record of the proceedings in the district court, was fatally defective for failure to point out in the record the alleged prejudicial remarks, rulings, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2956.]

SAME—EXCEPTIONS.

Where the printed record on a writ of error in a criminal case failed to disclose that any exception was saved to certain alleged objectionable conduct on the part of the trial judge, the objection could not be reviewed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2665, 2667.]

WITNESSES—CROSS-EXAMINATION—INTEREST.

It was competent for the defense in a criminal prosecution, for the purpose of impairing the testimony of a witness for the territory, to show his interest by asking him if he had not contributed money to aid in the prosecution, and what his purpose was in so doing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1195.]

SAME.

Where an attorney was offered as a witness for the territory in a criminal case, it was competent for the defendant to show that the witness had received a retainer in the case to assist in the prosecution, and also to show in what capacity he was retained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1201.]

SAME—IMPEACHMENT.

A witness was asked if stolen property had not been found in his possession and if witness had not been forced to pay for the property. *Held*, that the question was inadmissible, even to affect the credibility of the witness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1125, 1126.]

CRIMINAL LAW—WRIT OF ERROR—PREJUDICE.

In a prosecution for larceny, defendant was not prejudiced by certain questions asked a witness by the court concerning a conversation had between witness and defendant, in which witness told defendant that the matter could be fixed up by an explanation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3129, 3133.]

WITNESSES—CREDIBILITY—IMPEACHMENT.

In a prosecution for cattle theft, the credibility of a witness could not be impeached by proof that he had a "sweetheart" who was the niece of a fugitive from justice for murder, or that witness at times had consorted with persons reputed to have been charged with horse theft, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1125.]

CRIMINAL LAW—ERROR—PRESUMPTION—PREJUDICE.

Where an error is shown in a criminal case, it will be presumed to have been hurtful to the party against whom it has been committed, until it appears to have been rendered innocuous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3090–3099.]

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10. LARCENY—DEFINITION.

Where a territorial statute defined larceny as a taking with a felonious intent to deprive the owner of the property taken, and with intent to appropriate the same to the use and benefit of the taker, an instruction authorizing a conviction if the property was taken by defendant with the felonious intent to deprive the owner thereof was erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, § 191.]

In Error to the Supreme Court of the Territory of Oklahoma.

For opinion below, see 85 Pac. 239.

S. H. Harris (D. P. Marum, on the brief), for plaintiff in error.

W. O. Cromwell, Atty. Gen. (Don C. Smith, Asst. Atty. Gen., on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. The plaintiff in error (hereinafter for convenience designated as the defendant) was indicted, convicted, and sentenced to the penitentiary in the district court of Oklahoma Territory for the offense of grand larceny in stealing cattle, alleged to be the property of William Louthers. This judgment having been affirmed on appeal to the Supreme Court of the territory, the defendant sued out a writ of error from this court to have said judgment reviewed. The explanation of the two numbered cases is that the first writ of error was sued out from the Supreme Court of the Territory and attested by its clerk. To correct this a second writ of error was taken out in due form from this court, with the proper teste.

The jurisdiction of this court to review the decision of the Supreme Court of the territory is challenged by the Attorney General of the territory. The case of Folsom v. United States, 160 U. S. 121, 16 Sup. Ct. 222, 40 L. Ed. 363, was certified from this court to the Supreme Court to have determined the question as to whether the Circuit Court of Appeals had jurisdiction to review the decision of the Supreme Court of the territory of New Mexico affirming a judgment of the district court in a criminal proceeding, the punishment for which was imprisonment in the penitentiary. As such punishment brought the case within the definition of an infamous crime, as employed in section 5 of the act creating the Circuit Courts of Appeals of the United States, the Supreme Court answered the question submitted in the negative. Thereupon Congress, by Act Jan. 20, 1897, c. 68, 29 Stat. 492 [U. S. Comp. St. 1901, p. 549], amended the act establishing the Circuit Courts of Appeals by striking out the words "or otherwise infamous" from section 5 of the act; the purpose being to confer jurisdiction on the Courts of Appeal to review the decisions of the Supreme Court of the territory in criminal cases, including infamous crimes. In Ex parte Moran, 75 C. C. A. 396, 144 Fed. 599, Judge Sanborn, speaking for the court, said:

"This court has the power to review in that way final decisions of the Supreme Court of Oklahoma in all cases in which the jurisdiction below is dependent upon the citizenship of the opposite parties to the suit, in all admiralty cases, in all cases arising under the patent laws, the revenue laws, and the bankruptcy laws, and in all cases arising under the criminal

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laws except in cases of the conviction of a capital crime. [Authorities cited.] The fact may be noticed in passing that this court has the same jurisdiction by writ of error or appeal to review the judgments and decrees of the Supreme Court of Oklahoma that it has to review the judgments and decrees of the Circuit Courts of the United States within its circuit in which its judgments are final. Neither the Supreme Court nor this court has any jurisdiction to review in this way the judgments of the Supreme Court of Oklahoma in cases of a conviction of a capital crime."

The Supreme Court in New v. Oklahoma, 195 U. S. 252, 25 Sup. Ct. 68, 49 L. Ed. 182, has decided that writs of error from the Supreme Court of the United States to the Supreme Court of Oklahoma do not lie even in capital cases.

Counsel for the territory makes the contention that the jurisdiction of the Circuit Court of Appeals lies to review the decisions of the Supreme Court of the territory in criminal cases only where the United States is a party, and consequently where the criminal offense is denounced by federal statute, and not, as in this case, where the crime is proscribed by legislative act of the territory. In support of this proposition the case of Aztec Mining Company v. Ripley, 151 U. S. 79, 14 Sup. Ct. 236, 38 L. Ed. 80, is cited. It is true that in the opinion in that case the learned Chief Justice used the following language:

"By the fifteenth section of the judiciary act of March 3, 1891 (26 Stat. 830, c. 517 [U. S. Comp. St. 1901, p. 554]), the Circuit Courts of Appeals, in cases in which their judgments were made final by the act, were empowered to exercise appellate jurisdiction over the judgments, orders, or decrees of the Supreme Courts of the several territories; but as this case was not a case in admiralty, nor a case arising under the criminal, revenue, or patent laws of the United States, * * * it did not belong to either of the classes defined by section 6 of that act (26 Stat. 828 [U. S. Comp. St. 1901, p. 549]), as cases in which the judgments or decrees of the Circuit Courts of Appeals should be final."

It is evident that the words "of the United States" were either a mere inadvertence or that it was intended to apply alone to patent or revenue laws. The structure of the clause in the statute is, "in all cases arising under the patent laws, under the revenue laws, and under the criminal laws." There is nothing in the language employed by the statute to indicate that a review would not apply to cases arising under the criminal laws of the territory, as well as those of the United States. All statutes enacted by the territorial government are under authority of the organic act; and decisions of the territorial courts, in the absence of some words of negation or manifest omission in the organic act, are reviewable either by the Supreme Court or by the United States Courts of Appeal; and such has been the practice on appeals and writs of error from the Indian and Oklahoma Territories since the creation of the Courts of Appeal.

Turning to the matters sought to be reviewed under this writ of error, they are largely directed to the alleged misconduct of the trial judge in the treatment accorded to counsel for the defendant and his witnesses, and to alleged improper statements made by the judge in the presence of the jury. It is to be confessed that in some respects the trial of the case was conducted in a disorderly manner. It partook too much of a personal altercation among the respective counsel, in which, at times, the court participated. But, after reading the con-

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nection in which the matters complained of occurred, we are impresse with the fact that complaining counsel are not so blameless for th disagreeable incidents as to entitle them to cast the whole respons bility therefor upon the trial judge. It is a method sometimes resor ed to, as reprehensible as it ought to be infrequent, that in defens deemed possibly desperate, for counsel by their course of conduct so annoy and exasperate the judge as to make him, now and the forget the pedestal on which he sits, and by retaliation display an u judicial temper and lose his equipoise, in the expectation that therel he may be led into the commission of some reversible error. One the surest methods for counsel to inspire a proper dignity on the pa of the court and to obtain fair treatment is by their own respectf deportment and fairness to impress the court with a belief in their i tellectual honesty and sincerity, rather than by persistent contentio contradiction, and wrangling with the court, and at times injectir improper matters into the trial, invite antagonism from the court ar drive it from its propriety. To many of the unpleasant and reprehe sible incidents of the trial complained of by counsel for defendant, tl maxim might well be applied: "Communis error facit jus."

There were three attorneys engaged in the defense. Instead of tl examination and cross-examination of the witnesses being conducte by one of them at a time, frequently all three interjected questions ar objections, and when discussions arose in the progress of the tri the three would seem to be on their feet simultaneously, cross-firir at the opposing counsel and contending with the court. At times th would interrupt the court in the midst of a sentence being uttered l him, and, when reproved, the apology offered was after a fashion b to add to the offense. Had the court asserted its authority by cor manding ruling and a determined adherence to orderly procedur rather than by engaging in wrangling debate and recrimination, bo jurors and spectators doubtless would have been better impressed wi the fact that the courtroom is the sanctuary of justice, always calcula ed to promote calm consideration and an unbiased judgment.

Many of the assignments of error discussed in the argument ar briefs are in such disregard of the rules of this court, for the lack specifications and reference to where the incidents complained of ma be found in the record, as to disentitle them to consideration. Tl following is an example:

"The court erred in not reversing the cause on account of the miscondu of the presiding judge in making prejudicial remarks and insinuations, orde and rulings with reference to the defendant, his counsel, witnesses and pe sons not connected with the cause, as appears from the record of the pr ceedings in said district court."

Thus leaving this court to search out through the record the i stances sought to be reviewed.

Error is assigned to the action of the court in permitting referen by the prosecution, before the jury, to the fact that the defenda below did not testify on the preliminary hearing before the committin commissioner; but the printed record before us fails to show that ar exception was saved to this objectionable conduct, and therefore it unavailing to the defendant.

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The same is true of the error assigned respecting the conduct of court in threatening, in the presence of the jury, the arrest of one dges, a witness in the case, who, contrary to the order of the court the separation of the witnesses during the taking of the testi- ny, had re-entered the courtroom. If there was any error com- ted by the court in this occurrence, no exception to its action is closed by this record.

In the cross-examination of the witness Downs, introduced on be- f of the prosecution, the following occurred:

**Q. You are the man that contributed to this prosecution?**
**A. Yes, sir.**
**Q. You contributed to this prosecution for the purpose—**
**Mr. Dunn (the prosecutor): Now, if your honor please—**
**By the Court: Oh, I know it, Mr. Dunn; I know it. I have asked counsel try this case like men and like lawyers, but I can't get them to do it. It pparent to everybody in this room, to the jury and everybody, that we are trying this case like lawyers, or like men, or like anything else. I don't how counsel can do it, or why they do it."**

To this action of the court an exception was saved. It was certain- competent for the defense, for the purpose of impairing the force this witness' testimony, to show his interest by asking him if he had contributed money to aid in the prosecution, and what his purpose s in so doing. It is remarkable that the prosecution should have erposed and cut off the full answer. The contribution made by the ness may have been to engage the services of assistant counsel to in the prosecution, and his purpose may have been a commendable in the advancement of the cause of public justice. These were tters for the consideration of the jury in weighing the motives of witness and judging of the probity of his conduct and measuring weight of his testimony. There was nothing immediately con- ted with this episode to warrant the reproof given by the court to endant's counsel. As all error committed in the progress of a trial presumptively hurtful to the party against whom it is committed, il it appears to be rendered innoxious, the defendant has just cause complain of this action of the court as prejudicial.

The action of the trial court on the cross-examination of the wit- s Mountell by the defendant is criticised. It seems that the witness a lawyer, who was present at the preliminary hearing before the nmissioner, but did not testify therein. Since the preliminary ring he has been employed to assist in the prosecution. Having ne upon the witness stand to testify in behalf of the territory touch- certain inculpatory statements of the defendant, it was sought cross-examination to make the witness, in effect, admit that he had epted $250 to testify in the case. The court interposed with a rimand for thus insulting the witness. As this case is to be re- nded for a new trial, it is sufficient to say that it is competent for defendant to show that the witness has received a retainer in the e to assist in the prosecution, and to show in what capacity he was retained; but this, like everything else connected with a judicial uiry and investigation, should be done decently and respectfully, by per questions developing the facts, without counsel interjecting



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the assertion imputing corruption on the part of the witness without proper foundation therefor.

Criticism is made of the action of the trial court while the witness Johnson, who was a deputy sheriff, was being cross-examined by defendant's counsel. The first gross offense against legal propriety and professional conduct was committed by counsel for the defendant. Questions were propounded to the witness in a manner to put words in his mouth which he did not utter; and the witness seems to have become frightened or embarrassed, at which the court reproved him for not speaking out and testifying. Thereat one of the counsel for the defendant bluntly asked the witness if stolen property had not been found in his possession not a great while ago; and, when the court started to say he would not permit this, the said counsel, in utter contempt of the court's interposition, continued, "in which you were forced to pay for the property." The court then observed:

"There is no reason here why this witness should be insulted because he comes on the witness stand. If Mr. Johnson stands convicted of any act, or accused of it in any manner that would make it competent, that, of course, would be allowed to be shown. Mr. Johnson, what do you mean when you told the defendant that it wasn't too late to fix this matter up with an explanation?"

The witness then proceeded to state the meaning of what he said in that connection, whereat the court said:

"You mean to state you meant to tell him, if there was an explanation that there was no crime in it, that would be the end of it?"

Thereupon one of counsel for defendant excepted to the question of the court, and another of counsel for defendant interposed by saying:

"His intentions were evident. You are taking the wrong view of what—
"By the Court: Did you intend to convey the idea to him that you in any way would be instrumental in fixing up the case?
"By Defendant's Counsel: Wait.
"A. No, sir."

One of the counsel objected to the evidence as incompetent, irrelevant, and immaterial, and another co-counsel said: "We desire to reserve our exceptions." The witness then said:

"Well, am I allowed to explain further in regard to that?
"By the Court: I understand what you have said. If you have any other explanation, you may state it."

Further colloquy and wrangling ensued between counsel and the court. It would be discredible to counsel's competency as lawyers to impute to them lack of knowledge of the inadmissibility of such evidence even to affect the credibility of the witness. See Glover v. United States, 77 C. C. A. 450, 147 Fed. 426, recently decided by this court. As the question should have been excluded, and the explanation given by the witness was not even inculpatory, the question put to him by the court as to the effect of his meaning furnished no ground of error of which the defendant can be heard to complain.

On cross-examination by the prosecuting attorney of the witness George Hodges, an alleged accomplice of the defendant on trial, the

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prosecuting attorney, over the objection of defendant, was permitted to interrogate the witness as to whether he did not have a "sweetheart" by the name of Chaplain, who stayed at a certain hotel where the witness boarded, and whether she was a niece of one Sam Green. This was followed up, against the protest of defendant's counsel, with the following question:

"He is a fugitive from justice, isn't he, charged with the murder of the sheriff of Custer county?"

The objection to this was at first sustained. Then there occurred the following:

"Q. She [the witness' sweetheart] is a sister of Bud Chaplain, who was a member of the Perkins gang, was she not?"

This was objected to; but, without ruling by the court, the prosecuting attorney followed with this question:

"Q. And who was a fugitive from justice from Woods county, is that true?"

The court at first sustained the objection to this question. After argument pro and con in the presence of the jury, in which the prosecuting counsel assumed that said Green and Chaplain and others were thieves or murderers and fugitives from justice, the court took a recess for consideration, after which it admitted the questions and required the witness to answer. He denied any knowledge that Chaplain was a fugitive from justice for cattle or horse stealing. He was then required to answer if he did not know that Chaplain was a member of the Perkins gang, which he denied, but in answer to further interrogation admitted that he knew Perkins and that he knew Sam Green. Then the question was renewed if he did not know that Green was a fugitive from justice for cattle stealing and murder, to which the witness answered that he did not know of his being a fugitive for cattle stealing, but he had heard that he was for murder. A similar inquiry was permitted as to whether the witness did not know a man by the name of Bishop, to which he answered that he did. The following then occurred:

"Q. Were you not pursued and chased by Mr. Bishop—
"By Mr. Noah (of counsel for defendant): Now, that is objected to.
"Q. And charged with larceny of his horses?
"By Mr. Noah: That is objected to as incompetent, irrelevant, and immaterial; not proper cross-examination.
"By Mr. Snoddy (another of defendant's counsel): There is no evidence that he was chased by somebody.
"By Mr. Noah: That would come under the rule which the courts lay down of persons convicted of a crime. That may be inquired into after conviction, but the conviction only works that.
"By the Court: That is the rule upon which the courts seem to be hopelessly divided. I don't know what our Supreme Court holds."

The court, after further colloquy, said:

"I believe I will sustain the objection to this particular question."

Counsel for the prosecution then passed to another matter:

"Q. Do you know Pete Whitehead?
"A. Yes, sir.

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"Q. He also worked out there, when you did, with you, didn't he?
"A. No, sir.
"Q. You know that he is a fugitive from justice for stealing horses, don't you?
"A. I have heard—
(Here objection was interposed.)
"By the Court: I don't think it is competent unless you show the association.
"Q. Where did he stay?
"A. I never seen the man but a very few times in my life.
"Q. Didn't he stay there at Cooley's and at Mr. Lee Gray's ranch?
"A. No, sir; he never—"

This was, to say the least of it, an extraordinary proceeding. Even were it conceded that the credibility of a witness might be attacked because of his association with criminals, no foundation whatever was laid as a basis for the question. For aught that appears, the witness' sweetheart may have been as pure and spotless as the driven snow; and forsooth she might have been the niece of a fugitive from justice for stealing cattle or murder would not disentitle her to reap the reward of her own virtue or to enjoy the respect of good people. There was no proof offered whatever to sustain the imputation conveyed in the questions and the argument of counsel before the jury that Sam Green, Chaplain, and others were theives, or murderers, or fugitives from justice. They were not shown to be bad men, much less outlaws. An accused person might flee from arrest and yet be innocent. His flight would only be a circumstance to add to the sum of other inculpatory facts in evidence where he is on trial. The important and essential fact of guilt the prosecuting attorney was permitted by his questions to assume. The only conceivable purpose of such inquiry was to affect the credibility of the witness. The proper limitation placed upon such inquiry by the courts, recognizing an attack upon the character of a witness for gross immorality, is that it must pertain to his personal turpitude, such as to indicate such moral depravity or degeneracy on his part as would likely render him insensible to the obligations of an oath to speak the truth. In his treatise on Evidence (volume 2, pars. 923, 924), Mr. Wigmore, after asserting the better rule to be that the veracity of the witness is the only proper subject of inquiry, and, therefore, no question can arise as to admitting character for any other trait, says:

"But in jurisdictions where bad general character may be used, the question must also arise whether some other specific vice or group of vices is not as significant as bad general character in indicating a degeneration of the truth-telling capacity. One of the objections, indeed, urged against the use of bad general character, is that it necessarily brings in its train a number of consequential difficulties such as this. The better opinion, and the one usually reached, is that, in spite of logic's demands, policy requires that the line be drawn at bad general character, and that no specific quality other than that of veracity be considered."

It is certainly without authoritative precedent that a witness' credibility may be impeached by proof tending to show that he has at times consorted with persons reputed to be theives, and the like. If this

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ere the law, we apprehend few men who have stayed on cattle ranches n Oklahoma, among an indiscriminate lot of what is known as "cow oys," might safely go upon the witness stand without being subjected o just such an attack as was made upon the witness Hodges. Such cense of attack upon witnesses would make the courtroom a terror o honest men, and would justify their flight from the summoning fficer. The foregoing incident strikingly illustrates where the respon-ibility for the miscarriage of justice in criminal prosecutions should ometimes be placed, instead of imputing the reversal of convictions y the appellate courts to what is popularly termed "mere technical-ies." The zeal, unrestrained by legal barriers, of some prosecuting ttorneys, tempts them to an insistence upon the admission of incom-etent evidence, or getting before the jury some extraneous fact sup-osed to be helpful in securing a verdict of guilty, where they have restige enough to induce the trial court to give them latitude. When he error is exposed on appeal, it is met by the stereotyped argument hat it is not apparent it in any wise influenced the minds of the jury. The reply the law makes to such suggestion is: that, after injecting t into the case to influence the jury, the prosecutor ought not to be eard to say, after he has secured a conviction, it was harmless. As he appellate court has not insight into the deliberations of the jury oom, the presumption is to be indulged, in favor of the liberty of the itizen, that whatever the prosecutor, against the protest of the defend-nt, has laid before the jury, helped to make up the weight of the rosecution which resulted in the verdict of guilty.

In its charge to the jury, in defining what facts the jury should find o constitute the offense of larceny, the court in the last division of his submission said:

"That the property was taken by the defendant with the felonious intent o deprive the owner thereof."

The statute of Oklahoma adds to this definition the requirement that he caption must have been "with the intent to appropriate the same o his own use and benefit." The instruction, therefore, fell short of he statutory definition, and was erroneous.

Criticism is made in the brief of counsel for defendant upon other portions of the charge of the court to the jury, to the giving of which the record before us fails to show that any exceptions were taken, and, if the objections had been properly saved, the charge as a whole properly cured the alleged defect.

For the foregoing errors, the judgment of the Supreme Court of the territory must be reversed, and the cause remanded to the dis-trict court, with directions to set aside its judgment and the verdict, and grant a new trial.

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(149 Fed. 340.)

## EXCHANGE BANK et al. v. MOSS. *

## SAME v. DAVIS.

(Circuit Court of Appeals, Eighth Circuit. November 26, 1906.)

Nos. 2,349, 2,358.

1. TRIAL—INSTRUCTIONS—REFUSAL OF REQUESTS.

It is not the duty of a court to reform a requested instruction and to cast out such parts as render it improper as a whole.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 660, 668, 671.]

2. CONSPIRACY—ACTION FOR CONSPIRACY TO DEFRAUD—EVIDENCE.

Where the petition in an action to recover money alleged to have been obtained from plaintiff by means of a conspiracy between defendant bank and others alleged that such conspiracy covered an extended period of time, both before and after the transaction in suit, and was organized for the purpose of swindling all strangers who could be induced to enter into similar transactions, evidence of acts of the cashier of defendant bank in respect to similar transactions while conducting the business of the bank, or declarations made by him to other persons similarly defrauded tending to show the bank's complicity, whether such acts and declarations were before or after the transaction in issue, are admissible to establish the guilty intent and motive of the bank in the transaction involved in the case on trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, § 25.]

Sanborn, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Southwestern Division of the District of Missouri.

W. R. Robertson (A. E. Spencer, on the briefs), for plaintiffs in error.

Hiram W. Currey (Willard W. Padgett, on the brief), for defendants in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. These writs of error challenge judgments obtained by Moss and Davis in actions brought by them against the Exchange Bank and James P. Stewart to recover money of which they were defrauded at Webb City, Mo., by means of pretended foot races. The actions were consolidated for purpose of trial upon the authority of section 921, Rev. St. [U. S. Comp. St. 1901, p. 685], and were tried to a jury, which returned verdicts in favor of the plaintiffs. The complaint of each plaintiff was that he was a victim of a conspiracy between the bank, Stewart, its cashier, Boatright, and others, to entice strangers to Webb City and there to swindle them out of their money by false and fraudulent pretenses. The cases are like that of Stewart v. Wright (decided at the last term) 147 Fed. 321, 77 C. C. A. 499. If there is any noteworthy difference, it consists in more ample evidence in the records before us of the complicity of the defendants. Therefore neither the facts in detail nor the principles of law applicable to the cases in their general aspects need be stated here.

Some matters, however, that occurred during the trial, require notice. Two witnesses, Mantey and Wright, who were also victims of

* Rehearing denied January 10, 1907.

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the same swindling organization, described their transactions with the bank and narrated their conversations with James P. Stewart the cashier, and it appeared that their experiences were similar to those of the plaintiffs. The defrauding of the plaintiff Moss occurred April 14th, of plaintiff Davis on August 2d, of witness Mantey the latter part of August, and of witness Wright September 6th—all in the year 1901. It will thus be perceived that the witnesses were allowed to testify to matters that occurred after the transactions charged in the petitions. The defendant bank asked the court to instruct the jury "that none of the acts or declarations of any of its officers or agents, made after the transactions charged in either of these consolidated cases was closed, would bind these defendants." The instruction was refused, and each of the defendants excepted. It is to be noted that the instruction asked by the bank was directed against subsequent acts and declarations generally, without any indication of their character, and also that it was not so framed as to be for the protection of the bank alone, but extended to and embraced its codefendant, James P. Stewart. In one of its phases the instruction may be read as follows:

"None of the acts or declarations of James P. Stewart, the cashier of this bank, made after the transactions with the plaintiffs were closed, can bind him, the said Stewart."

As a proposition of law this is objectionable. As to Stewart personally, it was immaterial when his acts and declarations occurred, if they related to the transaction out of which his liability arose. For this reason, if for no other, the entire instruction was properly refused; for it is not the duty of a trial court to reform a requested instruction and to cast out such parts as render it improper as a whole. It is also to be observed that the instruction requested reads that the subsequent acts and declarations would not bind the defendants. If it was meant by this that such acts and declarations would not be conclusive, it is sufficient to say that the court instructed the jury that the evidence of subsequent transactions was received as tending to show the intent of the defendants in doing what they did. This was made plain at the trial. There was in the case no assertion or suggestion of a conclusive effect of any such acts or declarations. But it was probably the design of the instruction to challenge the admissibility against the bank for any purpose of testimony concerning other similar, but subsequent, transactions, such as those with Mantey and Wright. Assuming that to be a proper method of attacking evidence previously received during a trial, we are yet of the opinion that the trial court was right. It was alleged in the petitions that on the days the plaintiffs were defrauded, and for a long time prior and subsequent thereto, the bank, Stewart, Boatright, and others conspired and confederated for the purpose of swindling strangers who were enticed to the city where the bank was located. The charge was of an organized scheme to defraud all whom they could, that it was systematically pursued, and covered an extended period of time. The proof received was in harmony with the theory of the pleadings, and some of the victims who lost their money before the plaintiffs and others afterwards were allowed to

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testify to the participation of the defendants and the similarity of the methods employed. It was important in the actions on trial to discover the motive of the defendants, whether what they did at the time in question was the casual conduct of innocent parties intent upon their own lawful affairs, or whether it was inspired by the fraudulent purpose of assisting in the spoliation. It is the settled rule that in such a case evidence of similar acts at other times is admissible. The theory of the rule is that a succession of like instances tends to illustrate the character of the act under investigation and to negative innocence in the particular case. It is especially applicable where there is a charge of complicity in a scheme to defraud pursued as a vocation. Such a scheme is naturally conceived in secrecy, and the part of the defendant may be the performance of some act which furthers the accomplishment of the unlawful design, but which, when isolated from that which preceded and followed, may bear the aspect of innocence. Yet proof of a recurrence of similar acts in other cases where like frauds were perpetrated may be persuasive proof of a guilty purpose and so disclose the true character of the whole. The rule applies as well to corporations as to individuals, and therefore the acts and conduct of a corporation in collateral instances that may be shown in evidence must necessarily be the acts and conduct of its officers and agents in the course of the corporate business and of their employment. A corporation can speak and act in no other way.

In the application of the rule there is no distinction between those acts that were committed before and those that were committed after the one involved in the case on trial. The latter may be as significant of the intent of the defendant in the particular case as the former, and that is the quality which justifies the admission of the evidence. It is sometimes said that the collateral instances, evidence of which is admissible, are those that occurred at or about the time of the one in question, yet in practice the proximity in point of time is largely left to the discretion of the trial court. The same is true of the degree of similarity. There are cases in which such evidence was held admissible, though it related to acts preceding the one in question by several years. As was observed by the Circuit Court of Appeals of the Sixth Circuit in Mudsill Min. Co. v. Watrous, 9 C. C. A. 415, 61 Fed. 163:

"Remoteness in point of time may weaken their evidential value, but will not justify exclusion."

The doctrine announced is well illustrated in the following cases:

In Wood v. United States, 16 Pet. 342, 10 L. Ed. 987, there was a question whether fraud had been practiced upon the customs revenue law by undervaluing importations. Evidence was received of other similar undervaluations, some of which occurred before and others after those directly involved. Concerning the general rule, Mr. Justice Story, in delivering the opinion of the court, said:

"The question was one of fraudulent intent or not; and upon questions of that sort, where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judg-

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ent. Indeed, in no other way would it be practicable, in many cases, to es-
blish such intent or motive, for the single act, taken by itself, may not be
ecisive either way; but, when taken in connection with others of the like
aracter and nature, the intent and motive may be demonstrated almost with
conclusive certainty."

And of the specific objection to the evidence of the later occurrences
e said:

"The other objection has as little foundation; for fraud in the first im-
rtation may be as fairly deducible from other subsequent fraudulent importa-
ons by the same party as fraud would be in the last importation from prior
audulent importations. In each case the quo animo is in question, and the
esumption of fraudulent intention may equally arise and equally prevail."

Butler v. Watkins, 13 Wall. 456, 20 L. Ed. 629: Butler sued Wat-
ns and an English company of which he was managing agent to
cover damages for fraudulently pretending in a series of negotia-
ons that the company would conclude an arrangement for the manu-
cture and sale of certain articles under a patent which Butler held;
e real purpose, as alleged, being to keep him by protracted negotia-
ons from beneficial use of his invention during the season. No con-
act was concluded between the parties, and Butler lost the season.
he charge in the petition was not upon contract, but for fraud in
ading plaintiff to believe that a contract would be made. The de-
ndants prevailed in the trial court. The jury were charged that if
e corporation never gave any authority to Watkins to assent in its
ehalf and in its name to the proposal or to the draft of agreement
ibmitted by Butler, and never sanctioned the same as a corporate
ct, the suit could not be maintained against it. The Supreme Court
iid, however, that, if it was meant by this that no suit upon the con-
act could be maintained, the instruction was correct; but it could
ot have been so understood by the jury, as no such question was be-
ore them. The court observed:

"It does not follow, because the corporation never authorized or sanctioned
contract, that they may not be responsible for such a fraud as was alleged
the petition."

At the trial evidence offered by the plaintiff of a similar deceit prac-
ced by Watkins and his company was rejected. This was held to be
rror. The Supreme Court said:

"Deceit in effecting such a purpose lay at the basis of the action. But how
n such a purpose be shown when it has not been avowed? Actual fraud is
lways attended by an intent to defraud, and the intent may be shown by any
vidence that has a tendency to persuade the mind of its existence. Hence, in
ctions for fraud, large latitude is always given to the admission of evidence.
a motive exist prompting to a particular line of conduct, and it be shown
at in pursuing that line a defendant has deceived and defrauded one per-
n, it may justly be inferred that similar conduct towards another, at about
e same time and in relation to a like subject, was actuated by the same
pirit. If, therefore, it be true that in the spring or early summer of 1868 the
efendant had similar negotiations with Walley respecting his cotton tie, and
onducted towards him deceitfully in order to keep his tie out of the market
at year, the fact tends to show that in their conduct toward the plaintiff
ere was the same animus, and that they had the same object in view. That
e evidence offered was admissible for that purpose is abundantly proved by
e authorities."

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The general rule also found expression in Lincoln v. Claflin, 7 Wall. 132, 19 L. Ed. 106, a case of fraudulently obtaining plaintiff's property through combination and prearrangement upon false and fraudulent representations; in Castle v. Bullard, 23 How. 172, 16 L. Ed. 424, where commission merchants were charged with fraudulently selling plaintiff's property entrusted to them to irresponsible parties; and in Insurance Company v. Armstrong, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997, where the question was whether a life insurance policy secured at the instance of an assignee was with intent on his part to cause the death of the assured. In all of these cases proof of similar conduct at other times was admitted. In Moore v. United States, 150 U. S. 57, 60, 14 Sup. Ct. 26, 37 L. Ed. 996, the court held that where the question relates to the tendency of certain testimony to throw light upon a particular fact, or to explain the conduct of a particular person, there is a certain discretion on the part of the trial judge which a court of errors will not interfere with, unless it manifestly appear that the testimony has no legitimate bearing upon the question at issue and is calculated to prejudice the accused in the minds of the jurors.

In Dow v. United States, 27 C. C. A. 140, 82 Fed. 904, officers of a national bank and a depositor were charged with willful misapplication of funds with intent to injure and defraud the bank. Evidence of prior transactions was received. The court held that, where the issues involved the intent with which certain acts were done, a trial court is justified in giving a reasonably wide latitude to the introduction of evidence tending to show it.

Bacon v. United States, 38 C. C. A. 37, 97 Fed. 35: An officer of a national bank was charged with making a false report of its condition, with intent to injure and defraud the bank and to deceive any agent who might be appointed by the comptroller to examine its affairs. Other reports containing false statements made during the preceding 18 months and testimony that his attention was directed to them 4 months before the commission of the act charged was held by this court to be admissible on the question of defendant's fraudulent purpose.

In Mudsill Min. Co. v. Watrous, 9 C. C. A. 415, 61 Fed. 163, there was a suit to rescind the sale of a silver mine on the ground of fraud. It was charged that samples of ore taken from the mine had been "salted" to induce complainant to purchase. Evidence was admitted to show that defendant had "salted" samples used in prior negotiations with other persons for the sale of the same mine. One of these instances occurred about three years before.

Penn. Mut. Life Ins. Co. v. Trust Co., 19 C. C. A. 286, 72 Fed. 413, 38 L. R. A. 33: Upon the question of intent with which an untrue answer in an application for insurance was made, it was held that evidence of similar answers in other applications made within three months thereafter was competent. The court said:

"But it is suggested that the fact that the instances sought to be proven were subsequent to the instance in issue destroys their relevancy, because the fraudulent intent present in them might have been formed after an innocent mistake. This possibility, of course, affects the probative force of these

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ıbsequent instances to show fraud; but we do not think it makes them inad-
ıissible."

In Spurr v. United States, 31 C. C. A. 202, 87 Fed. 701, the col-
ıteral transactions of which evidence was received to show defend-
nt's intent in certifying certain checks as a bank officer extended
ack more than six years. It was said:

"The objection that the collateral transactions were too remote is not tena-
le. It goes only to the weight of the testimony. The period of time within
hich the matter offered to establish the guilty purpose must have occurred
permit of their admission is largely discretionary with the court."

Complaint is also made of the admission of the testimony of other
itnesses than Mantey and Wright upon the same grounds. The dates
f the occurrences which some of them related as set forth in the
rief of counsel do not correspond with the dates in the record; but,
ssuming that he is correct, the contentions are disposed of by what has
lready been said.

It is contended that the trial court erred in permitting to be read
ı evidence the cross-examination of Joseph C. Stewart, the president
f defendant bank, as contained in a bill of exceptions in another
ase of the same character previously tried in a state court. It was ad-
iitted that the document was the bill of exceptions. The part sought
be read was proved to be a true transcript of the original steno-
raphic notes of the cross-examination of Joseph C. Stewart. This
as shown by a witness who was the official stenographer at the time
nd who was prepared to read from his notes. Defendant's counsel
aid he made no point that the reading should be from the notes, in-
tead of from the transcript. The objection was to the cross-examina-
on as a whole. Joseph C. Stewart was at the time a defendant in
ıe cases then on trial, though afterwards discharged by the court at
ıe close of the evidence. We see no error in this.

The remaining assignments of error do not require special mention.
ome are disposed of by the opinion in Stewart v. Wright, 77 C. C. A.
99, 147 Fed. 321, and such of the others as are set forth, identified, and
iscussed in accordance with the rules have been examined and found
ıntenable.

Affirmed.

SANBORN, Circuit Judge (dissenting). The plaintiffs in these
ases, as did the plaintiff in Stewart v. Wright (C. C. A.) 147 Fed.
21,[1] have recovered judgments for moneys they lost in gambling trans-
ctions which involved their own moral turpitude, which were violative
f the general laws of public policy of the nation and state, and in
hich they knowingly engaged for the purpose of defrauding others.
or the reasons stated in my dissenting opinion in that case, I am un-
ble to concur in the affirmance of these judgments. I think they
hould be reversed.

[1] 77 C. C. A. 499.

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(149 Fed. 346.)

## CLEAGE v. LAIDLEY et al.

(Circuit Court of Appeals, Eighth Circuit. November 8, 1906.)

No. 2,413.

1. BANKRUPTCY—INVOLUNTARY BANKRUPT—NATURAL PERSON NOT ENGAGED IN MANUFACTURING OR TRADING MAY BE.

A natural person may be adjudged an involuntary bankrupt, although he is not "engaged principally in manufacturing, trading, printing, publishing or mercantile pursuits." The quoted clause qualifies "any corporation" only. U. S. Comp. St. 1901, p. 3423, § 4b, 30 Stat. 547, c. 541, § 4b.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 40.

What persons are subject to bankruptcy law, see note to Mattoon Nat. Bank v. First Nat. Bank, 42 C. C. A. 4.]

2. GAMING—WAGERS—CONTRACTS FOR FUTURE DELIVERY VALID—INTENTION OF PARTIES TO SETTLE BETWEEN THEMSELVES ON DIFFERENCES MAKES WAGERS AND VOID.

Contracts for the purchase and sale for future delivery of grain or other personal property are lawful and valid. But the intention of the parties to such a contract to discharge their obligations under it by the payment by one of the parties to the other of the difference between the contract price and the market price of the commodity sold, and never to make or accept any delivery, renders the agreement a wager and makes it void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gaming, §§ 22, 25.]

3. SAME—INTENTION TO SELL CONTRACT BEFORE TIME OF PERFORMANCE DOES NOT AVOID.

A sale of a contract for future delivery, or of rights under it, before the time of delivery, is not unlawful. An intention by the parties to such a contract to sell it, or to sell their rights under it before the day of delivery, so that they will not deliver or receive any of the contracted commodity does not make the contract a wager nor avoid it. Ponder v. Jerome Hill Cotton Co., 40 C. C. A. 416, 420, 100 Fed. 373, 377.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gaming, § 22.]

4. SAME—INTENTION TO SETTLE BY SET-OFF AND RINGING OFF DOES NOT MAKE CONTRACT WAGER NOR AVOID IT.

The settlement of the obligations of such contracts by set-off and by ringing off and by paying the differences according to the rules and practice of the Board of Trade of Chicago is not unlawful. The intention of the parties to such contracts to discharge their obligations under them as far as possible by set-off and by ringing off in this way, and to receive or to deliver only that portion of the contracted commodities for which they may be unable to settle in that way, is not illegal, and does not render the contracts or transactions wagers or void. Board of Trade v. Christie Grain & Stock Co., 25 Sup. Ct. 637, 198 U. S. 236, 248, 249, 49 L. Ed. 1031.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gaming, § 22.]

5. EVIDENCE—PROOF OF WRONG TO AVOID CONTRACTS MUST BE CLEAR—FACTS—CONCLUSION.

The legal presumption is that parties to contracts valid on their faces intend in good faith to perform them. One who would avoid his contracts and escape their obligations by his own wrong should establish it by clear proof. A speculator dealt in about 14,000,000 bushels of grain, and less than 2 per cent. of it was delivered. He made contracts valid on their faces for the purchase of grain for future delivery through brokers who were members, respectively, of the Board of Trade of Chicago or of the Merchants' Exchange of St. Louis and became indebted to them for balances of account. He testified that he did not intend to deliver or to receive any grain under his contracts unless forced to do so in order to prevent his contracts from being closed out under the rules of the

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board or the exchange. *Held*, this evidence did not establish an illegal intention, because it did not disclose a purpose to settle the obligations of his contracts by paying to, or receiving from, the other parties thereto the differences between the contract prices and the market prices at the times of delivery, but it was consonant with an intention to settle the obligations of his contracts as far as possible by set-off and by ringing off and by the payment of differences in accordance with the rules of the board and to deliver and receive that portion of the contracted grain for which he could not thus settle, and this was not an unlawful intention, and did not render the transactions wagers or void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 84.]

3. INSOLVENCY—EVIDENCE—SUFFICIENCY.

Proof that one had property of the value of only about $50 and that he owed more than $25,000 in July, and that he paid no part of this indebtedness during the succeeding four months, is sufficient evidence that he was insolvent in the following October and December. A condition of insolvency is presumed to continue as long as such conditions usually continue under similar circumstances.

(Syllabus by the Court.)

Appeal from the District Court of the United States for the Eastern District of Missouri.

Chester H. Krum, for appellant.

Richard A. Jones (Nathan Frank and David W. Voyles, on the brief), for appellees.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. T. A. Cleage, Jr., was adjudged a bankrupt upon the petitions of W. H. Laidley, Thomas E. Price, and the W. C. Lamping Grain Company, upon the ground that, while insolvent and within four months before the filing of the petition against him, he paid to the C. H. Albers Commission Company, one of his creditors, $3,000, and thereby preferred it. This adjudication is assailed because, as counsel for the defendant insists, he was a speculator in grain, and was not engaged in trading or in mercantile pursuits, because he was not indebted to any of these alleged creditors for the reason that their claims are founded upon transactions with him in the purchase and sale of grain wherein he never intended to deliver or to receive the articles which he bought or sold, but meant to settle his contracts by the payment or the receipt of the differences between the contract prices and the market prices at the times of the performance of the contracts, and because he was not insolvent when he made the payments to the Albers Commission Company. The bankruptcy law of 1898 reads:

"Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts." 30 Stat. c. 541, § 4b, p. 547, 3 U. S. Comp. St. 1901, p. 3423, § 4b.

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The clause "engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits" is limited in its qualifying effect to the words "any corporation." Any unincorporated company may be adjudged an involuntary bankrupt, although it is not engaged in manufacturing or trading, and is engaged chiefly in farming or in the tillage of the soil, and any natural person who is not a wage-earner or engaged chiefly in farming or the tillage of the soil may be adjudged an involuntary bankrupt, although he is not "engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits." Cleage was not a wage-earner or a person engaged chiefly in farming or the tillage of the soil, and he was therefore liable to an adjudication as an involuntary bankrupt whether or not he was principally engaged in manufacturing, trading, or any other pursuit. In re Seaboard Fire-Underwriters (D. C.) 137 Fed. 987, 988; In re Taylor, 42 C. C. A. 1, 3, 102 Fed. 728, 730; In re Lake Jackson Sugar Co. (D. C.) 129 Fed. 640, 642; Lovelands' Law & Proceedings in Bankruptcy, p. 142.

The creditors whose claims are challenged were brokers who bought and sold grain for future delivery for the defendant, Cleage, either on the Board of Trade of Chicago or upon the Merchants' Exchange of St. Louis, and their claims are for amounts which they paid for the defendant in excess of the amounts which they received for him in the settlement or performance of contracts which they made or assumed on his behalf, and also for expenses, commissions, and interest. There is no doubt that the defendant owes these balances unless the transactions from which they sprang were illegal and Cleage's contracts were void for the reason that he did not intend to receive the grain he purchased nor to deliver the grain he sold, but to settle his obligations by the payment of differences.

Before entering upon the discussion of this question under the evidence, we lay aside certain purchases and sales of puts and calls, privileges, or options to deliver or to take grain at specified prices which appear in some of the accounts, because the master and the court below eliminated these from the claims allowed and held that such purchases and sales were wagers. The claims of the petitioners and of the Albers Commission Company which were sustained are for balances of moneys expended by the brokers above the amounts they received in the settlement or performance of contracts for the purchase and sale of grain for future delivery, which the brokers had made for the defendant by his direction upon the Board of Trade or the Merchants' Exchange. These contracts were not options, but by their terms complete agreements of both parties, of the one to buy and to take, and of the other to sell and to deliver, the commodity. The only option contained in them was that the seller had the right to select the day in the future month in which the delivery was to be made when that should be done. The transactions of the defendant with these four brokers were, in all respects material to the question to be determined, of the same character. Each of the brokers was a member either of the Chicago Board of Trade or of the Merchants' Exchange of St. Louis, and was governed by its rules which were

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known to the defendant. Cleage deposited with the broker a sum of money termed a "margin" to secure the latter against any loss that might be occasioned by the fluctuations of the market price of the commodities in which the defendant dealt. Cleage directed the broker to buy or to sell grain to be delivered in some future month. The broker purchased of, or sold to, another broker as directed by Cleage upon the board or the exchange in accordance with its rules, which forbade dealing in differences on the fluctuations of the market without a bona fide purchase and sale of the article for an actual delivery. The brokers who were parties to these purchases and sales made written contracts in their own names whereby they agreed that one would buy and receive and the other would sell and deliver in the future month specified the grain which the defendant ordered his broker to buy or to sell. These contracts were in writing, were signed by the brokers, and bound them and the defendant, the undisclosed principal who ordered them, unless they were rendered void by the unlawful intent of the defendant. As soon as they were made and as often as any sale or substitution or settlement or modification of any of them was made, the defendant was notified and he ratified them.

The rules of the Board of Trade and of the St. Louis Exchange were such that, where one had bought and had also sold large quantities of grain upon the board or upon the exchange to be delivered in a certain future month, these purchases and sales might be set off against each other so that he would be required to pay the difference in the price of the grain thus set off and to deliver or receive only that portion of the grain which was not thus set off. This was accomplished in two ways, by the direct method and by ringing off. In Board of Trade v. Christie Grain & Stock Co., 198 U. S. 236, 247, 25 Sup. Ct. 637, 49 L. Ed. 1031, Mr. Justice Holmes describes these methods in this way:

"The direct method consists simply in setting off contracts to buy wheat of a certain amount at a certain time against contracts to sell a like amount at the same time, and paying the difference of price in cash at the end of the business day. The ring settlement is reached by a comparison of books among the clerks of the members buying and selling in the pit, and picking out a series of transactions which begins and ends with dealings which can be set off against each other by eliminating those between—as, if A. has sold to B. 5,000 bushels of May wheat, and B. has sold the same amount to C., and C. to D. and D. to A. Substituting D. for B. by novation, A.'s sale can be set off against his purchase, on simply paying the difference in price."

The only effect of the use of these methods is to avoid the useless expense and trouble of the physical delivery of the grain, and still to preserve the legal rights and remedies of the parties. If A. has sold to B. 5,000 bushels of grain at 75 cents per bushel to be delivered on a certain day, and B. has sold to A. the same quantity at 74 cents per bushel to be delivered on the same day, it is evident that the legal, financial, and actual result is the same whether A. delivers the grain to B., B. pays 75 cents per bushel for it to A. and delivers it back to A., who pays to B. 74 cents per bushel for it, or they set off the two contracts and B. pays to A. the difference in price or 1 cent per bushel. In either event, the grain ultimately remains in A.'s posses-

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sion, and he gets one cent per bushel from B. and no more. The setting off of the contracts has all the effects of a delivery of the grain. The same thing is true of a ring settlement. This method is more complex, but, if it is followed carefully through, it will be found that the results are the same whether the contracts are all specifically performed by actual delivery of the grain according to the terms of each contract or they are settled by ringing them off. There is a slight difference in the rules of the Board of Trade of Chicago and of the Merchants' Exchange of St. Louis. The rules of the former provide for settlements by ringing off, while the rules of the latter provide a method of accomplishing the same result in a slightly different way. As the difference is immaterial the indirect method of settling will be termed "ringing off" in this opinion.

The defendant was operating through his brokers under these rules, and was trying to run a corner. He bought through his brokers during the years 1902 and 1903 immense quantities of grain for future delivery amounting to about 14,000,000 bushels, and he sold nearly as much as he bought, so that more than 98 per cent. of his contracts were settled by set-offs and by ringing off without any actual delivery of grain. All the transactions which the defendant had with Laidley were disposed of in this way, and there remained a balance of $3,650 due from him to Laidley on account of the payments the latter had made of differences upon contracts thus set off, commissions, expenses, etc., for which he gave to Laidley his promissory note. Through the Lamping Grain Company he bought about 3,000,000 bushels of grain for future delivery. Most of this grain was sold or other grain was sold to offset it, but 50,000 bushels of wheat were delivered to the Lamping Company under the defendant's contracts in July, 1903, for which that company was compelled to pay the contract price, and in July, 1903, there was due to it on account of these transactions $3,922.97. He was also indebted in July, 1903, to the petitioner, Thomas E. Price, in the sum of $18,235.85 on account of similar transactions. In October, 1903, he owed C. H. Albers Commission Company upon a like account a debt of several thousand dollars, and he paid thereon $2,000 in October and $1,000 in December.

Under the rules of the board and of the exchange, when one fails upon the delivery day to take and pay for the grain which he has purchased under a contract which has not been settled by set-off or by ringing off, all his trades are closed up and thrown upon the market. Cleage had no elevator or warehouse, and he testified that he did not intend to receive any of the grain he bought, but intended to settle on differences. On cross-examination he said:

> "I expected to have to take some of this corn or wheat, as the case might be, but I would only take that amount that was forced on me in order to keep my trades from being thrown over, as I knew very well that if I failed to take cash wheat or corn that they delivered to me that my contracts would all be closed up and thrown on the market."

Under the common law and under the statutes of Illinois a contract for the sale for future delivery of grain or other commodities, the parties to which intend that the goods shall not be delivered, and that the obligation of the contract shall be discharged by the payment

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one party to it to the other of the difference between the contract ice and the market price of the goods at the date fixed for their livery, is void, because the contract evidences a wager. Irwin v. illiar, 110 U. S. 499, 508, 4 Sup. Ct. 160, 28 L. Ed. 225; Embrey Jemison, 131 U. S. 336, 345, 9 Sup. Ct. 776, 33 L. Ed. 172; Bibb Allen, 149 U. S. 481, 492, 13 Sup. Ct. 950, 37 L. Ed. 819; Ponder Jerome Hill Cotton Co., 40 C. C. A. 416, 419, 100 Fed. 373, 376; xley v. Boynton, 79 Ill. 351. And under the statutes and decisions the state of Missouri such a contract is void if either of the parties it has such an intention. Rev. St. Mo. 1889, §§ 3837, 3838; Connor Black, 132 Mo. 150, 33 S. W. 783; Edwards Brokerage Co. v. evenson, 160 Mo. 516, 527, 61 S. W. 617. In this state of the evi- nce and of the law the master found, and the court below affirmed s finding, that neither the brokers nor the defendant ever had such an tention in the transactions which are the subject of this litigation, d this finding is assigned as error. So far as it concerns the inten- on of the brokers, it is supported by their testimony and by the fact at they received and paid for several thousand bushels of grain hich were delivered to them upon contracts which they had made for e defendant upon his orders. But counsel insist that the testimony the defendant, the immense quantities of grain which he bought d sold, the small percentage of it actually delivered and the public licy of the nation to suppress wagers establish his illegal purpose, nvey notice of it to his brokers, and avoid his obligations to pay them r the money which they advanced on his behalf and the commissions ey sought to earn. Let us see. He testified that he did not in- nd to receive the grain which he bought, but that he intended to ke and pay for that portion which was forced upon him for the ason that, if he did not do so, all his contracts would be closed. hat is the true signification of this testimony in the light of the les of the board and of the exchange and of the practice of settle- ent by set-off and by ringing off, to which attention has been called? is that he intended to sell so many of his contracts of purchase and much other grain that all his contracts of purchase would be either ld or discharged by set-off or by ringing off, so that, when the times f delivery came, he would be under no obligation to receive. This as not an unlawful intention, and it did not avoid his obligations nder the late decision of the Supreme Court. "Set-off" says Mr. ustice Holmes in Board of Trade v. Christie Grain & Stock Co., 98 U. S. 236, at page 248, 25 Sup. Ct. 637, at page 639 (49 L. Ed. 031), "has all the effects of delivery. The ring settlement is simply more complex case of the same kind. These settlements would e frequent, as the number of persons buying and selling was com- aratively small. The fact that contracts are satisfied in this way by et-off and the payment of differences detracts in no degree from the ood faith of the parties, and, if the parties know when they make uch contracts that they are very likely to have a chance to satisfy em in that way and intend to make use of it, that fact is perfectly onsistent with a serious business purpose and an intent that the con- act shall mean what it says. There is no doubt, from the rules of e Board of Trade or the evidence, that the contracts made between



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the members are intended and supposed to be binding in manner and form as they are made. There is no doubt that a large part of those contracts is made for serious business purposes. 'Hedging,' for instance, as it is called, is a means by which collectors and exporters of grain or other products, and manufacturers who make contracts in advance for the sale of their goods, secure themselves against fluctuations of the market by counter contracts for the purchase or sale, as the case may be, of an equal quantity of the product, or of the material of manufacture. It is none the less a serious business contract for a legitimate and useful purpose that it may be offset before the time of delivery in case delivery should not be needed or desired."

In other words, contracts for future delivery made with the intention of settling them by paying to the other parties to the contracts the difference between the contract prices and the market prices at the times of delivery are wagers and are void. But contracts for future delivery made with the intention of settling them by set-off or by ringing off and by the payment of differences in accordance with the rules and practice of the Board of Trade are valid and enforceable agreements under this decision.

Nor does the fact that the defendant dealt in 14,000,000 bushels of grain, and that the contracts for more than 98 per cent. of this property were settled by set-off or by ringing off and by the payment of differences, demonstrate an illegal intention. Since the intention to settle in this way is not unlawful, the fact that contracts were so settled cannot evidence an illegal purpose. "In the view which we take," says the Supreme Court, "the proportion of the dealings in the pit which are settled in this way throws no light on the question of the proportion of serious dealings for legitimate business purposes to those which fairly can be classed as wagers or pretended contracts. No more does the fact that the contracts thus disposed of call for many times the total receipts of grain in Chicago. The fact that they can be and are set off sufficiently explains the possibility, which is no more wonderful than the enormous disproportion between the currency of the country and contracts for the payment of money, many of which in like manner are set off in clearing houses without any one dreaming that they are not paid, and for the rest of which the same money suffices in succession; the less being needed the more rapid the circulation is." Board of Trade v. Christie Grain & Stock Co., 198 U. S. 236, 250, 25 Sup. Ct. 637, 49 L. Ed. 1031.

It is the public policy of the United States to suppress wagers, but it is also its policy to enforce the obligations of valid contracts, and one who would avoid his agreements and escape his obligations by his own wrong should be required to establish it by clear and convincing proof. Contracts for the future delivery of grain and other personal property are lawful and valid. The legal presumption is that the parties who make them intend to perform them, and the burden is on him who avers that the illegal intention of one or more of these parties has made them void to establish his allegation by plenary proof. Clews v. Jamieson, 182 U. S. 461, 489, 21 Sup. Ct. 845, 45 L. Ed. 1183; Pixley v. Boynton, 79 Ill. 351. An intention by one or both of the parties to sell such an agreement, or their rights

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under it, before the time of delivery, does not avoid it. Parties have the same right to buy contracts for the future delivery of personal property with the intention of selling them that they have to buy the property with such an intention. Ponder v. Jerome Hill Cotton Co., 40 C. C. A. 416, 420, 100 Fed. 373, 377. An intention to discharge a contract for the future delivery of personal property by set-off or by ringing off under the rules and practice of the Board of Trade and by the payment of differences is not illegal, and does not render the agreement void. The contracts which form the foundation of the claims of the brokers which are here in question were made and ratified by the defendant. They were legal contracts per se. There was no evidence that either the defendant or the brokers intended to settle them without the delivery of any grain by the payment to, or receipt from the other parties to the agreements of the difference between the contract prices and the market prices at the times of performance. The intention not to receive grain unless forced to do so to protect his contracts to which the defendant testified is consonant with the lawful intention to sell like quantities of grain and to settle his obligations as far as possible by set-offs and by the use of rings, so that he would be obligated to receive but little or none of the commodities. From the lawful contracts the legal presumption arose that the parties thereto intended in good faith to perform them. It was the opinion of the master and of the court below that this presumption was not overcome by the evidence. Their opinion raises a strong presumption in support of this conclusion. Where the court below and its master have considered a question and made a finding on conflicting evidence, their conclusion is presumptively correct, and it ought not to be disturbed unless an obvious error has intervened in the application of the law or some serious mistake has been made in the consideration of the facts. Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; Stearns-Roger Mfg. Co. v. Brown, 52 C. C. A. 559, 563, 114 Fed. 939, 943; Dodge v. Norlin, 66 C. C. A. 425, 433, 133 Fed. 363, 371. A careful review of the evidence in this case and a thoughtful consideration of the law applicable to it has failed to convince that there was any mistake in the finding of the master and of the court below that neither the defendant nor the brokers had any illegal intent in the making or in the performing of the contracts upon which the claims of these brokers rest. Our conclusion is that they constitute just obligations of the defendant, and that the payment of the $3,000 to the Albers Commission Company wrought a voidable preference, and was an act of bankruptcy.

In reaching this conclusion the claim of counsel for the defendant that there was no competent evidence of insolvency has not been overlooked. It is true that there was no evidence of the amount of the assets of the defendant at the times when the payments were made to the Albers Commission Company in October and November, 1903. But it is also true that the defendant admitted in July of that year that he was "broke," and that he had no property except the furniture in his offices, which was not worth more than $50. There was uncontradicted evidence that he owed the petitioners more than $25,000, and that

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he had never paid any part of these debts. It may be that a state of insolvency once proved is not presumed to continue forever, but it is presumed to continue as long as such a state of affairs usually continues under similar circumstances. A man who has property of the value of only $50 and who owes over $25,000 in July, which he does not pay, does not usually accumulate assets worth more than $25,000 by the next December, and there was no mistake in the finding of the court that the defendant's poverty in July had not turned into wealth in December.

The findings of the master and of the court are sustained by the evidence, the facts warrant the adjudication, and the decree below is affirmed.

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(149 Fed. 354.)

## FRANCISCO v. CHICAGO & A. R. CO.

(Circuit Court of Appeals, Eighth Circuit. November 23, 1906.)

No. 2,225.

1. APPEAL AND ERROR—REQUESTED JUDGMENT OF NONSUIT NOT REVIEWABLE.

No writ of error will lie at the suit of a plaintiff to review a judgment of nonsuit or dismissal rendered in a national court at his request or with his consent. Such a judgment, however, rendered on the motion of the defendant and against the objection and the protest of the plaintiff is reviewable at the latter's instance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 717-723, 883.]

2. SAME—CALLING AN INVITED NONSUIT "INVOLUNTARY" IS FUTILE—FACTS—CONCLUSION.

At the close of a trial the defendant moved the court to instruct the jury to return a verdict in its favor, and its motion was granted. But before the instruction was given the plaintiff asked, and was granted, leave by the court to take an involuntary nonsuit, and a judgment was rendered accordingly. *Held*, the nonsuit was entered with the consent and at the request of the plaintiff, and no writ of error could be maintained at his suit to review it. Describing it by a false epithet did not change its character.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 883.]

3. COURTS—APPEAL AND ERROR—ACT OF CONFORMITY (REV. ST. § 914) INAPPLICABLE TO APPELLATE COURTS AND PROCEEDINGS FOR REVIEW.

The act of conformity (section 914, Rev. St. [U. S. Comp. St. 1901, p. 684]) has no application to the practice or proceedings of appellate courts or to matters relating to bills of exceptions, motions for new trials, or any other means adopted to secure a review of the judgments or decrees of the Circuit or District Courts. Its effect is limited to the practice and proceedings in the trial courts to secure their judgments.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 914.]

4. SAME—POWER AND PRACTICE OF NATIONAL APPELLATE COURTS UNAFFECTED BY STATUTES OF STATES OR PRACTICE OF THEIR COURTS.

The power and practice of the federal appellate courts are derived exclusively from the Constitution, the acts of Congress, the common law, the ancient English statutes, and the rules and practice of the courts of the United States, and they are neither controlled nor affected by the statutes of the states or the practice of their courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 937.]

(Syllabus by the Court.)

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In Error to the Circuit Court of the United States for the Eastern District of Missouri.

I. N. Watson and D. V. Herider, for plaintiff in error.

Edward L. Scarritt, William C. Scarritt, and Elliott H. Jones, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. The plaintiff below is the plaintiff in error here. He brought an action against the defendant to recover $5,000 damages for the negligent killing of George L. Gerew. The defendant denied its liability. There was a trial of the issues before a jury. At the close of the evidence the defendant moved the court to instruct the jury that under the pleadings and evidence they must find a verdict for the defendant. The court granted the motion, and the plaintiff excepted. But before the jury were actually instructed the plaintiff prayed leave of the court to take an involuntary nonsuit. The court granted him permission and a judgment was rendered accordingly. Subsequently the plaintiff moved the court to set aside this judgment of nonsuit and to grant a new trial of the action, and this motion was denied. He has sued out this writ of error to secure a reversal of this judgment of nonsuit on account of numerous alleged errors in the trial of the action, and especially because the court held that the evidence was insuffcent to sustain his cause of action and that the defendant was entitled to a verdict thereon.

But invited error is irremediable. If the court erred in the rendition of the judgment of nonsuit, it erred at the plaintiff's request and to the prejudice of the defendant, and that error can form no ground for the reversal of the judgment at the suit of the plaintiff who procured it. A judgment of nonsuit upon the motion or request of the defendant and against the objection or protest of the plaintiff is reviewable by writ of error. Central Transp. Co. v. Pullman's Car Co., 139 U. S. 24, 29, 39, 40, 11 Sup. Ct. 478, 35 L. Ed. 55; Meehan v. Valentine, 145 U. S. 611, 614, 618, 12 Sup. Ct. 972, 36 L. Ed. 835.

But a judgment of nonsuit on the motion, at the request or with the consent of the plaintiff, is not reviewable by writ of error at his suit, because he is estopped from convicting the trial court of an error which he requested it to commit. U. S. v. Evans, 5 Cranch (U. S.) 280, 3 L. Ed. 101; Evans v. Phillips, 4 Wheat. (U. S.) 73, 4 L. Ed. 516; Central Transp. Co. v. Pullman's Car Co., 139 U. S. 24, 39, 11 Sup. Ct. 478, 35 L. Ed. 55; Maxwell Land Grant Co. v. Dawson, 151 U. S. 586, 606, 14 Sup. Ct. 458, 38 L. Ed. 279; Avendano v. Gay, 8 Wall. (U. S.) 376, 377, 19 L. Ed. 422; U. S. v. St. Louis, etc., Trans. Co., 184 U. S. 247, 249, 22 Sup. Ct. 350, 46 L. Ed. 520. In U. S. v. Evans, 5 Cranch (U. S.) 280, 3 L. Ed. 101, the trial court rejected certain evidence offered by the attorney of the United States. He took a bill of exceptions, became nonsuit, and moved the court to set aside the nonsuit and to grant a new trial. His motion was denied, and he sued out a writ of error to reverse the judgment. Chief Justice Marshall said that in such a case, where there has been a nonsuit, and a motion to reinstate overruled, the court could not interfere, and

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the judgment was affirmed. In Evans v. Phillips, 4 Wheat. (U. S.) 73, 4 L. Ed. 516, the plaintiff submitted to a nonsuit in the court below and the Supreme Court held that he could not secure a review of that judgment because he had consented to it, and dismissed the writ. In Central Transp. Co. v. Pullman's Car Co., 139 U. S. 24, 29, 38–40, 11 Sup. Ct. 478, 35 L. Ed. 55, and Meehan v. Valentine, 145 U. S. 611, 614, 618, 12 Sup. Ct. 972, 36 L. Ed. 835, the defendants moved for, and secured, judgments of nonsuit against resisting plaintiffs, and the Supreme Court held that the latter might maintain writs of error to review them. But in rendering this decision that court was careful to distinguish these cases from those in which the plaintiffs themselves consent to or procure the judgments, and it said:

"It is true that a plaintiff, who appears by the record to have voluntarily become nonsuit, cannot sue out a writ of error. United States v. Evans, 5 Cranch (U. S.) 280, 3 L. Ed. 101; Evans v. Phillips, 4 Wheat. (U. S.) 73, 4 L. Ed. 516; Cossar v. Reed, 17 Q. B. 540. But in the case of a compulsory nonsuit it is otherwise; and a plaintiff, against whom a judgment of nonsuit has been rendered without his consent and against his objection, is entitled to relief by writ of error." 139 U. S. 39, 11 Sup. Ct. 478, 35 L. Ed. 55.

In Koons v. Bryson, 16 C. C. A. 227, 69 Fed. 297, the Circuit Court of Appeals of the Fourth Circuit failed to note this radical distinction and to observe that the conformity act (section 914, Rev. St. [U. S. Comp. St. 1901, p. 684]) has no application to methods of review or to proceedings in the federal appellate courts, and was thereby led to the conclusion that a plaintiff might maintain a writ of error to review a judgment of nonsuit which he had himself requested—a conclusion which the decisions of the Supreme Court to which reference has been made and the reasons for the rule thereby established forbid us to follow. But the same court in later decisions in Huntt v. McNamee, 141 Fed. 293, 72 C. C. A. 441, and Parks v. Southern Ry. Co., 143 Fed. 276, 74 C. C. A. 414, reversed its former holding and recognized the rule adopted by the Supreme Court and the fact that the act of conformity has no application to the practice or proceedings of the federal appellate courts. In the former case Judge Goff, speaking for the court, said:

"Where the record disclosed that the plaintiff had voluntarily become nonsuited, a writ of error was refused him. Evans v. Phillips, 4 Wheat. (U. S.) 73, 4 L. Ed. 516; Cossar v. Reed, 17 Q. B. 540; Central Transportation Co. v. Pullman's Car Co., 139 U. S. 24, 39, 11 Sup. Ct. 478, 35 L. Ed. 55."

In Parks v. Southern Ry. Co., 143 Fed. 276,[1] a case which arose in North Carolina, where, in the state courts, a plaintiff may take a nonsuit at any time before verdict, the defendant at the close of the evidence had moved the court to instruct the jury to return a verdict in his favor, and the court had sustained the motion. Plaintiff then moved for leave to take a nonsuit. The court denied his motion and instructed the jury to return a verdict for the defendant. The Circuit Court of Appeals held that, when the motion to instruct the jury for the defendant was made, the plaintiff was put to his election to then take his nonsuit or to submit the whole case upon the motion to instruct, that the motion for leave to take a nonsuit after the decision upon the motion to instruct came too late,

[1] 74 C. C. A. 414.

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nd that there was no error in the subsequent refusal of the court o grant the nonsuit. While a different rule has been established n this circuit in cases coming from Missouri, in deference to a statute f that state and in conformity to the practice in its trial courts (Chiago, M. & St. P. Ry. Co. v. Metalstaff, 41 C. C. A. 669, 101 Fed. 69), the opinion in the Parks Case contains a statement of the duty f courts to respect the rights of defendants, as well as plaintiffs, to a awsuit, to make an end of litigation and to prevent the abuse of the neans of administering justice by the trial of experiments upon the ourts with defective causes of action, which strongly appeals to our udgment and presents a persuasive argument in support of the rule nder consideration. Judge Pritchard said:

"It is highly important that the court in the exercise of its discretion should ot only see that equal and exact justice is done between litigants, but it is qually important that needless litigation should be speedily determined, and n the trial of cases the court should consider the rights of the defendant as ell as those of the plaintiff, and, where it appears that all the evidence which is possible to obtain has been offered and the case has been submitted to he jury or to the court, it is the duty of the court, if in its opinion the evience is not sufficient to justify a verdict in favor of the plaintiff, to direct he jury to return a verdict in favor of the defendant. The courts are not rganized for the purpose of permitting the plaintiff in an action to experiient with a certain state of facts for the purpose of ascertaining the opinion f the court as to the law applicable to the same and then permit him to ithdraw from the scene of conflict and state a new cause of action and mend is licks in another direction. Such policy, if adopted, would be productive f much mischief, and should not be tolerated."

The difference between a judgment upon an instructed verdict and judgment of nonsuit is that the former prevents, while the latter ermits, the maintenance of another action for the same cause. When he evidence was closed in the suit before us, each party had establishd rights in the trial of this action. The plaintiff had the right to lect whether he would take a nonsuit (section 639, Rev. St. Mo. 899; Chicago, M. & St. P. Ry. Co. v. Metalstaff, 41 C. C. A. 669, 01 Fed. 769), or would submit the whole cause upon the motion to nstruct and endeavor to secure a verdict in his favor. The defendant ad a right to elect whether it would endeavor to obtain a nonsuit r a verdict on the merits in its favor. It chose the latter alternative nd moved the court for a directed verdict. This motion the plainiff opposed and submitted the cause to the court for decision. The ourt granted the motion, and the plaintiff excepted. He then had the ight to elect whether he would take a nonsuit and bring another acion on the same cause, or would take a verdict against himself and ecure a review of the rulings of the court by a writ of error. He hose the former remedy. He moved the court for leave to take an nvoluntary nonsuit. The parties then stood in this situation: The efendant asked and pressed for an instructed verdict and thereby ecessarily objected to the nonsuit which gave the plaintiff an opportunity to bring another action. The plaintiff prayed for the nonuit and thereby necessarily objected to the instructed verdict and to a udgment which would prevent his maintenance of another action. The court granted the request of the plaintiff and denied that of the

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defendant. Plaintiff thereby secured his right to maintain his action for the same cause, and the defendant lost the judgment in its favor and the entire benefit of a trial in which it had succeeded. The nonsuit was obtained by the act and request of the plaintiff against the motion and objection of the defendant, and it may not be successfully challenged by a writ of error procured by the former.

It is said that this was an involuntary nonsuit because the plaintiff was forced to take it by the decision of the trial court that he had proved no cause of action, and that the Supreme Court of Missouri has often so decided and has reviewed cases from the inferior courts of that state upon writs of error to such judgments. Williams v. Finks, 156 Mo. 597, 57 S. W. 732; Ready v. Smith, 141 Mo. 305, 42 S. W. 727; English v. Mullanphy, 1 Mo. 780; Collins v. Bowmer, 2 Mo. 195; Bates County v. Smith, 65 Mo. 464; Schulter's Adm'r v. Bockwinkle's Adm'r, 19 Mo. 647; Dumey v. Schoeffler, 20 Mo. 323; Greene Co. v. Gray, 146 Mo. 568, 48 S. W. 447. The answer is (1) that whether the nonsuit was voluntary or involuntary in the conception of the Supreme Court of Missouri, and whether or not it would have been reviewable by that court, if it had been granted by an inferior court of that state, an indispensable condition of its review at the instance of a plaintiff in error in a national court is that it was granted "without his consent and against his objection," and this judgment lacks this condition, for the nonsuit was granted at his request and by his active procurement; (2) that the plaintiff was not forced by the decision of the court below that he had failed to prove his case to take a nonsuit, but he had the option to take the verdict and judgment against him and to review it, and if it was erroneous to reverse it by writ of error, or to take the dismissal of the action and try again; and (3) that his choice of the latter alternative cannot be made involuntary by placing that deceptive adjective before it in the face of the record that he was free to proceed to verdict, judgment, and review, or to a judgment of nonsuit, and that of his own free will and against the motion and objection of his opponent he asked and secured the dismissal. The real character of this nonsuit cannot be reversed or concealed by applying to it a false epithet.

The decisions of the Supreme Court of Missouri cited above, wherein it has reviewed by writs of error judgments of nonsuit of the character of that in hand, are urged upon our attention, and section 914 of the Revised Statutes of 1899, the act of conformity, which requires the forms and modes of proceeding in civil actions at law in the Circuit and District Courts to conform as near as may be to those in the courts of the state in which the actions arise, is invoked to induce us to follow the practice of that court. But the power and practice of the national appellate courts and the means of reviewing the judgments of the Circuit and District Courts therein are neither conditioned, affected, or controlled by the statutes of the states, the practice of their courts, or the act of conformity. Section 914 is limited by its express terms to the practice and proceedings in the Circuit and District Courts to procure their judgments. It has no application to the practice or proceedings of the federal appellate courts

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or to any matters relating to bills of exceptions, motions for new trials, or any other means adopted to review the judgments of the Circuit or the District Courts. The power and practice of the federal appellate courts are derived exclusively from the Constitution, the acts of Congress, the common law, the ancient English statutes, and the rules and practice of the courts of the United States, and they may not be extended, diminished, controlled, or affected by the statutes of the states or the practice of their courts. Chateaugay Iron Co., Petitioner, 128 U. S. 544, 554, 9 Sup. Ct. 150, 32 L. Ed. 508; Hudson v. Parker, 156 U. S. 277, 281, 15 Sup. Ct. 450, 39 L. Ed. 424; City of Manning v. German Ins. Co., 107 Fed. 53, 55, 57, 46 C. C. A. 144, 146, 148; Hooven, Owens & Rentsehler Co. v. John Featherstone's Sons, 49 C. C. A. 229, 235, 111 Fed. 81, 87; Louisville & N. Ry. Co. v. White, 40 C. C. A. 352, 356, 100 Fed. 239, 243; West v. East Coast Cedar Co., 51 C. C. A. 411, 415, 113 Fed. 737, 741; St. Clair v. U. S., 154 U. S. 134, 153, 14 Sup. Ct. 1002, 38 L. Ed. 936; Boogher v. Ins. Co., 103 U. S. 90, 95, 26 L. Ed. 310; Newcomb v. Wood, 97 U. S. 581, 24 L. Ed. 1085; Fishburn v. Railway Co., 137 U. S. 60, 11 Sup. Ct. 8, 34 L. Ed. 585; Kentucky Life Acc. & Ins. Co. v. Hamilton, 63 Fed. 93, 98, 11 C. C. A. 42, 47; Elder v. McClaskey, 17 C. C. A. 259, 278, 70 Fed. 529, 556.

It has been a fixed rule of practice of the appellate courts of the United States for almost 100 years that no writ of error will lie at the suit of a plaintiff to review a judgment of nonsuit which has been rendered at his request or with his consent, and that no judgment will be reversed for an error which the plaintiff in the writ has invited the court to commit, and the fact that the Supreme Court of Missouri calls such a nonsuit "involuntary" and reviews it presents no persuasive reason why one of the national appellate courts should depart from this salutary rule while there are many why it should abide by and enforce it. Courts are established and maintained to settle and terminate controversies between citizens and to enforce their rights, not to furnish debating societies for the trial of legal experiments. The chief reason of their being is to end, not to perpetuate, disputes. "Interest reipublicæ ut sit finis litium." A practice which permits a plaintiff to experiment with the courts and to harass the defendant interminably at will runs counter to the basic purpose of legal tribunals and of all civilized governments, and, instead of assisting to wisely administer justice, it inflicts and perpetuates wrong. Yet this is the practice which a grave review of such nonsuits as that in hand would establish. Under it a plaintiff could introduce his evidence and try the Circuit Court to see whether or not it would sustain his action. If it granted a motion to instruct a verdict against him, he could procure from the court an involuntary nonsuit, then sue out a writ of error and try the appellate court, and, if it would not sustain his action, he could pay the costs, bring another action for the same cause, and continue his actions and experiments interminably. The federal courts ought not to permit themselves to be made the subjects of such experiments. The only material interests involved in the review of such judgments are the costs of the actions, for the plaintiffs may try their causes again whatever the decisions of the appellate courts, and the demands upon these

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courts for the decision of real and important issues are too grave and pressing to permit them to devote their time to litigation so frivolous.

There is a more compelling reason why proceedings of this nature should not be sustained. The plaintiff is not the only party to a lawsuit who has rights. The defendant has some, and one of them is the right, not only to a fair and impartial trial of the action against him, but to a final adjudication of the alleged cause which the plaintiff presents and to a termination of the litigation upon it. This right he can never enforce, this termination he can never secure under the practice here proposed, for there is no limit to the number of actions on the same cause, or on the want of it, which the plaintiff may bring, review, and dismiss under it.

The conclusion is that a writ of error will not lie in a national appellate court at the suit of the plaintiff to review a judgment of nonsuit or dismissal which has been rendered at his request or with his consent after the court has held at the close of the trial that the defendant is entitled to a verdict.

This case has been considered and determined upon the theory that the evident intention of the plaintiff and of the court to render a judgment of nonsuit had been effected. But the form of the judgment is such that a claim may be made that it was a judgment on the merits. For this reason alone the judgment will be reversed, the defendant in error will recover its costs in this court, and the case will be remanded to the Circuit Court, with directions to render a judgment that the action be dismissed without prejudice to the right of the plaintiff to maintain another for the same cause, and that the defendant recover its costs of the plaintiff, and it is so ordered.

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(149 Fed. 360.)

## McDONALD et al. v. KANSAS CITY BOLT & NUT CO.

(Circuit Court of Appeals, Eighth Circuit. November 12, 1906.)

No. 2,324.

1. SALES—CONTRACT FOR SUCCESSIVE DELIVERIES—VENDOR'S BREACH IN FIRST MAY RELIEVE VENDEE FROM LIABILITY FOR SUBSEQUENT.

   In an entire contract for successive deliveries of goods sold, a vendor's breach in the earlier deliveries may relieve the vendee from liability for subsequent deliveries, if prompt notice of refusal to perform is given by the latter.

2. SAME—VENDEE HAS OPTION TO PERFORM OR REFUSE WHICH IS LOST BY DELAY.

   Upon discovery of the vendor's breach, the vendee has the option to perform, or to refuse to perform, the remainder of the contract. But silence, delay, or failure to give notice of his choice to refuse is a choice to perform, and it destroys the option.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 318, 319.]

3. SAME—IMMEDIATE NOTICE OF REFUSAL INDISPENSABLE TO VENDEE'S RELEASE FROM LIABILITY TO SUBSEQUENTLY PERFORM.

   Immediate notice to the vendor, upon the discovery of his default in the earlier deliveries, that the vendee will not receive subsequent deliveries, or will not further perform, is an indispensable condition of

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the latter's release from liability for subsequent deliveries which comply with the contract.

4. DAMAGE—BREACH OF CONTRACT—MEASURE.

Those damages which are the natural and probable result of a breach of a contract, those which the parties may reasonably anticipate as the effect of the breach under the particular circumstances of the case, which are known to them when the contract is made, and those only, may be recovered in actions upon contracts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 58.]

5. SALES—BREACH OF CONTRACT—ORDINARY RULE.

The difference between the value of the goods furnished and the value of the goods the vendor agreed to furnish constitutes the measure of damages the vendee is entitled to recover for a failure to furnish articles of an agreed character, in the absence of knowledge of special circumstances which make other damages natural and probable, because these are the only damages that would naturally flow from the breach of such a contract in the usual course of events.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 1174–1201.]

6. DAMAGES—BREACH OF CONTRACT—KNOWLEDGE OF SPECIAL CIRCUMSTANCES.

Proof of knowledge by the defaulting party at the time he makes the contract of special circumstances which make damages other than those ordinarily implied by the contract and naturally flowing from it the natural and probable effect of its breach will warrant the recovery thereof.

7. SAME—PROXIMATE AND REMOTE DAMAGES—FACTS—CONCLUSION.

A manufacturer sold steel pipe-bands, which it knew at the time it made the contract were to be used by the purchaser to bind together staves in wooden pipes for the purpose of conducting water to a city. There were latent defects in the bands made under this contract, which were not discoverable until an attempt was made by the purchaser to bend them around and to fasten them upon the pipes.

*Held*, the loss of the expense of hauling the bands, which were defective, from the railroad station to which they were sent under the contract to the place of their use, a few miles distant, of loading, unloading, distributing, gathering, counting, painting, and of placing them upon and taking them off the pipes when broken, was the natural and probable effect of such defects, which a person of ordinary prudence in the circumstances of the manufacturer would have anticipated, and the vendee was entitled to recover it as damages.

But alleged damages, in addition to those above specified on account of delay, loss of time, trouble, and extra work of superintendence, were too remote and speculative for allowance.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Colorado.

John Q. Dier (John P. Brockway, Charles J. Hughes, Jr., and Gerald Hughes, on the brief), for plaintiffs in error.

Edwin Van Cise and Walter Littlefield (Frank L. Grant, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. The Kansas City Bolt & Nut Company, a corporation, brought an action against R. P. McDonald, who had agreed to purchase from it nine car loads of steel bands, rods, nuts, and shoes, and against John S. Worthington and Thomas Keely,

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who had guarantied McDonald's performance of his contract, for the purchase price of the last four car loads of the goods which the vendor delivered, but which McDonald had refused to receive. Five car loads of the material had been received and paid for by him before these four car loads were shipped. The defendant answered the complaint for the price of these cars that the articles furnished failed to fulfill the terms of the contract, that the bands, which were made for the purpose of encircling and holding together wooden pipes made of staves for the purpose of conducting water from a reservoir in the mountains to the city of Golden, had latent defects, which caused many of them to break and become worthless when they were bent around the pipes and secured in place, but which were not discoverable by inspection, and that the defendant, McDonald sustained damages by his attempt to use the bands in the five car loads which he received in the sum of $3,687.29, for which he asked to recover upon a counterclaim. There was a verdict for the plaintiff, in which the jury allowed to the defendant a portion of this counterclaim, and at the hearing in this court counsel for the defendants below, the plaintiffs in error, conceded that the judgment should be affirmed unless there was error in the refusal of the Circuit Court to submit to the jury the first instruction which they requested, or in its rulings upon the measure of damages which McDonald was entitled to recover on account of the failure of the plaintiff to comply with the contract. This was the requested instruction:

"If the jury believe from the evidence in this case that the pipe-bands first shipped to defendants by plaintiff did not comply with the terms of the written contract between the parties hereto, and that the defendants were thereby damaged; that the defendants had a right to presume that the four car loads of pipe-bands thereafter shipped to them were of the same kind as those previously shipped, and that they had a right to refuse to accept them."

The facts disclosed by the evidence which were material to the determination of the question of the legality of this instruction are these: The contract was made in April, 1903, and by its terms the goods were to be shipped between June 1st and September 1st in that year to the city of Golden, Colo., free on board the cars at Kansas City, Mo., where the plaintiff was to manufacture them. The contract did not require the plaintiff to bend the pipe-bands, and the first two car loads were delivered about the last of July, 1903, without bending them. Some of these pipe-bands broke in the process of securing them around the pipes, and McDonald immediately complained to the plaintiff that they were defective and that they broke. Thereupon the plaintiff bent the bands which it subsequently shipped, at its factory, and promised to replace free of cost those that had broken. In August, September, and October McDonald received and paid for three car loads of these bent bands. The bands in these car loads were much better than those in the first two loads, so much better that out of 7,655 half-inch bands which broke in the entire five car loads about 7,600, according to the testimony of McDonald, were in the two or three car loads first shipped, and only about 55 in the last two or three car loads he used. It was in this state of the case

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that in the latter part of October and in November, 1903, the plaintiff shipped the four remaining car loads of pipe-bands and other materials which its contract required it to furnish, and after they had arrived at Golden, and in December, 1903, McDonald, without any examination or trial of these articles, refused to receive them because the pipe-bands he had obtained from the previous car loads were defective. The question is, had this purchaser the right to presume that the four car loads last shipped were of the same character as those previously shipped, and to refuse to accept them because those first shipped did not comply with the terms of the agreement? The question is divisible, and it involves these two issues: Had the purchaser the right to presume that the pipe-bands in the last four cars were of the same kind as those previously shipped, and the right to reject them on account of this presumption? And had the purchaser the right to reject them regardless of the presumption because those first shipped did not fulfill the stipulations of the agreement? Conceding, without deciding, that from the fact that 7,600 half-inch bands in the first three cars broke a presumption arose that bands subsequently shipped would be of the same character and would fail to comply with the contract, that presumption was destroyed before the four car loads were sent by the fact that only about 55 of the bands of this kind in the two intermediate car loads broke; and if any presumption on this subject existed, it was the counter presumption that the pipe-bands in the four subsequent car loads would be of the same better quality as those last received by McDonald, which appear to have substantially complied with the contract. Hence, he had no right to reject those in the last four car loads on account of the alleged presumption claimed in the requested instruction, and the first question must be answered in the negative.

Counsel insist, however, that the purchaser had the right to refuse to take the articles in the last four car loads regardless of their presumptive character, because the goods furnished by the plaintiff in its first deliveries were not in accordance with the terms of the contract, and in support of this proposition they cite Norrington v. Wright, 115 U. S. 188, 205, 6 Sup. Ct. 12, 29 L. Ed. 366; King Philip Mills v. Slater, 12 R. I. 82, 34 Am. Rep. 603; Cleveland Rolling Mill v. Rhodes, 121 U. S. 255, 7 Sup. Ct. 882, 30 L. Ed. 920; Pope v. Allis, 115 U. S. 363, 371, 372, 6 Sup. Ct. 69, 29 L. Ed. 393; Husted v. Craig, 36 N. Y. 221; Campbell Printing Press & Mfg. Co. v. Marsh, 20 Colo. 22, 36 Pac. 799; Filley v. Pope, 115 U. S. 213, 219, 220, 6 Sup. Ct. 19, 29 L. Ed. 372; National Surety Co. v. Long, 125 Fed. 887, 60 C. C. A. 623, and other cases of like character. The decisions in these cases hold that, where the vendor is required by an entire contract, as in the case at bar, to make successive deliveries of the articles sold, and the first deliveries fail to comply with the terms of the agreement either in the quality or quantity of the goods or in the times or places of delivery, the vendee by prompt notice of his refusal to further perform upon the discovery of the failure may relieve himself from liability for subsequent deliveries. This, however, is not his only remedy. He has the option, upon the discovery of the

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seller's default, to refuse to receive and pay for further deliveries, and thus to terminate the contract, or to permit its performance to proceed, and to rely upon his damages for the vendor's breach. But he may not delay his exercise of this choice. Delay, vacillation, silence, or the absence of an immediate notice that he will not further perform is an election by the vendee that the performance of the contract shall proceed, and that he will rely upon his claim against the vendor for damages for the breach, and upon that claim alone, for his remedy. He is met here by the principle of estoppel, by the rule that he who by his acts or statements, or by his silence when he ought to speak out, intentionally or negligently induces another to so act that he will sustain injury by the former's denial of his acts, statements, or silence or of their natural effect, is estopped to repudiate them. If he remains silent after he discovers the fault of the vendor, and permits him to incur the trouble and expense of the subsequent preparation and delivery of the contracted goods, he is thereby estopped from claiming a release from his obligation to receive and to pay for them on account of the defects in the earlier deliveries. Immediate notice to the vendor, upon the discovery of his default in the earlier deliveries, that the vendee will not further perform the contract, is an indispensable condition of the latter's release from his liability to accept and to pay for subsequent deliveries which comply with the terms of the agreement. Pullman Car Co. v. Metropolitan Ry. Co., 157 U. S. 94, 110, 111, 15 Sup. Ct. 503, 39 L. Ed. 632; Clark v. Wheeling Steel Works, 53 Fed. 494, 498, 3 C. C. A. 600, 604; German Sav. Inst. v. De La Vergne Refrig. Mach. Co., 70 Fed. 146, 154, 17 C. C. A. 34, 37.

The chief failure of the plaintiff was in the character of the pipe-bands in the first two car loads of materials, which were delivered about the last of July, 1903. McDonald discovered this default in August of that year, and immediately complained of it. The plaintiff thereupon furnished three more car loads of better bands, which it bent at the factory, and promised to replace all that had been broken free of charge. McDonald received, used, and paid for the three latter car loads. The plaintiff was a manufacturer. It was making and shipping these bands for the specific purpose of binding the wooden pipe that was to be used to conduct water to the city of Golden. The pipe-bands were not worth their contract price in the open market for any other purpose. McDonald gave the manufacturer no notice that he would not accept and pay for the remaining four car loads which the vendor was required to make and deliver, and the plaintiff manufactured and shipped them in the belief that he would do so. It was not until after these four car loads had arrived at Golden, and not until December, 1903, that he first gave notice to the plaintiff that he would not accept them because the bands previously shipped had been defective. The notice came too late. The vendee was estopped by his receipt of the three car loads after his knowledge of the vendor's default, by his failure to notify it of his intention not to receive the remainder of the contracted articles, and by the fact that the plaintiff had made and shipped them in reliance upon the contract which required it to do so, and upon the vendee's acts and silence, in the full belief that he would accept and pay for them, from relieving himself

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from liability for them on account of any previous defaults of the vendor. The second question must therefore be answered in the negative, and there is no ground upon which the requested instruction can be sustained.

We turn to the question of the measure of McDonald's damages. He claimed: (1) The contract price of the broken bands; (2) the freight on them from Kansas City to Golden; (3) the expense of loading, of hauling from the station at Golden to the place of use, and of unloading them; (4) the expense of distributing, gathering, and counting them; (5) the expense of painting them and of putting them on and taking them off the pipes; and (6) his loss by delay, trouble, and extra work of superintendence caused by the breaking of the bands. The Circuit Court allowed evidence of the first two items, and refused to allow any evidence of the others, to be considered by the jury. The rules of law by which the measure of damages in this case must be ascertained are no longer open to discussion. Those damages which are the natural and probable result of a breach of a contract, those which the parties may reasonably anticipate as the effect of the breach under the particular circumstances of the case, which are known to them when the contract is made, and those only, may be recovered in an action upon a contract. Rockefeller v. Merritt, 22 C. C. A. 608, 617, 76 Fed. 909, 918; Central Trust Co. v. Clark, 92 Fed. 293, 297, 34 C. C. A. 354, 358.

In the absence of proof aliunde of knowledge by the defaulting party at the time an ordinary contract of sale is made of special circumstances which make other damages the natural and probable effect of its breach, the difference between the value of the goods furnished and the value of the goods the vendor agreed to furnish constitutes the measure of the damages which the vendee may recover for a failure to furnish articles of the agreed character, because this is the only damage implied by the contract, the only damage that would naturally flow from its breach in the usual course of events. Central Trust Co. v. Clark, 34 C. C. A. 354, 358, 92 Fed. 293, 297; Drug Co. v. Byrd, 92 Fed. 290, 34 C. C. A. 351; Railroad Co. v. Bucki, 16 C. C. A. 42, 46, 68 Fed. 864, 868; Hadley v. Baxendale, 9 Exch. 341, 354, 356; Primrose v. Telegraph Co., 154 U. S. 1, 29, 14 Sup. Ct. 1098, 38 L. Ed. 883; The Ceres, 19 C. C. A. 243, 72 Fed. 936, 943; Boyd v. Brown, 17 Pick. (Mass.) 453, 461; Ingledew v. Railroad, 7 Gray (Mass.) 86, 91; Railway Co. v. Mudford (Ark.) 3 S. W. 814, 816; Kempner v. Cohn, 47 Ark. 519, 527, 1 S. W. 869, 58 Am. Rep. 775.

Proof of knowledge by the defaulting party at the time he makes the contract of special circumstances which make damages other than those implied by the contract and naturally flowing from it the natural and probable effect of its breach will warrant the recovery thereof. Boutin v. Rudd, 27 C. C. A. 526, 82 Fed. 685; Central Trust Co. v. Clark, 92 Fed. 293, 298, 34 C. C. A. 354, 359; Accumulator Co. v. Dubuque St. Ry. Co., 12 C. C. A. 37, 42, 64 Fed. 70, 79.

The bolt company admits in its answer that at the time it made the contract with McDonald he claimed that he had entered into a contract with the city of Golden to construct for it a system of waterworks; that it knew that the material it was to furnish was to be

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used in the manufacture of a pipe line of some kind at or for the city of Golden, in accordance with certain blue prints which were furnished to it; and that before it executed the agreement it had caused an investigation to be made of some proceedings of the city of Golden antecedent to the date of the contract of the city with McDonald, and had doubted the legality of any contract between him and the city. The defects of the broken bands which the plaintiff furnished were latent, and were discoverable by the purchaser, in the ordinary course of events, by actual application to the wooden pipe only. A vendor who knew that these pipe-bands were to be used by the purchaser in the construction of wooden pipes would reasonably anticipate that such latent defects which caused the bands to break when an attempt was made to bend them around and to fasten them upon the wooden pipes would entail upon the purchaser who bought them the useless expense of hauling them from the station at Golden to the place where they would be used upon the pipes; of loading and unloading them for the purpose of this transportation; of distributing, gathering, and counting them; of putting them on and taking them off the pipes, and perhaps of painting them, if painting was necessary and customary before such bands were applied to such a purpose. This expense was the natural and probable effect of these latent defects—an effect which a person of ordinary prudence and foresight, possessed of the knowledge of the plaintiff, might well anticipate, because he must know that in the ordinary and natural course of events the bands could not be applied to the pipes, and their defects would not be discoverable until they had been loaded, hauled, unloaded, and put upon the pipes. The court should therefore have received the evidence in support of the third, fourth, and fifth items of damages specified above, which amounted, in the aggregate, according to the claim of McDonald, to $673.02.

The sixth item of damages claimed is $1,500 for delay, loss of time, trouble, and extra work of superintendence occasioned by the breaking of the bands and the substitution of others in their place. In view of the fact that the time and labor, and hence the delay, of the men and of the teams in hauling, loading, unloading, putting on, and taking off the bands is specified and allowed in the preceding items, this claim is too remote and speculative to sustain a recovery or to permit of an allowance. The damages here claimed are not the natural and probable effect of the defects in the bands, and they could not have been reasonably anticipated therefrom by a person of ordinary prudence in the circumstances of the vendor. There was no error in the rejection of the evidence which related to this item.

The result is that the only error in the trial of the case was the rejection of the evidence in support of the third, fourth, and fifth items of damages. Since the entire amount claimed on account of these items is $673.02 and interest, and the defendant cannot possibly secure the allowance of more on account of them, but may upon a new trial obtain less than this amount, all error to the prejudice of the defendants may be extracted from this case by the reduction of the judgment against them by the amount of $673.02 and interest. The judgment below will accordingly be reversed, and the case will

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be remanded to the Circuit Court, with instructions to grant a new trial unless within 40 days from the filing of this opinion the plaintiff remits from and satisfies the judgment below as of the date of its rendition to the extent of $673.02, and interest thereon at 6 per cent. per annum from October 27, 1903, to May 27, 1905, and files a transcript of its remittitur and satisfaction in this court, in which case the judgment will be affirmed, with costs against the defendant in error, and it is so ordered.

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148 Fed. 681.)

## DECKER v. KEDLY.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1906.)

No. 1,298.

HUSBAND AND WIFE—RIGHTS OF ACTION BETWEEN—ACTION BY WIFE FOR DAMAGES.

A wife cannot, either before or after divorce, maintain an action to recover damages from her husband for his failure to supply her with the necessaries of life, or for any other act or failure of duty connected with or arising from the marital relation.[1]

In Error to the District Court of the United States for the District of Alaska, Division No. 1.

On February 7, 1905, the plaintiff in error brought an action against the defendant in error to recover damages. She alleged in her complaint that from August 22, 1902, until January 18, 1905, she and the defendant in error were husband and wife; that during the whole of that time the defendant in error, although he was sound in body and pecuniarily able to furnish his family with the necessaries of life, willfully, wrongfully, and wantonly refused, failed, and neglected so to do; that by said willful, wrongful, and wanton acts of the defendant in error the plaintiff in error has been damaged in the sum of $2,071.75. She demanded judgment for said sum, and for $2,000 additional thereto as exemplary damages. The defendant in error demurred to the complaint on the ground that it stated no cause of action. The demurrer was sustained, and judgment was entered for the defendant in error. To review that judgment the plaintiff in error brings this writ of error.

E. M. Barnes, for plaintiff in error.

R. F. Lewis, for defendant in error.

Before GILBERT and MORROW, Circuit Judges, and DE HAVEN, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

This case may be disposed of in a few words. A woman sues a man for damages on the ground that the latter, during the time while he was her husband, wantonly refused to supply her with the necessaries of life. The allegations of the complaint leave it uncertain whether at the time of bringing the action the parties thereto had been divorced. It is not important to the decision of the question here involved whether there had or had not been a divorce. In either case the allegations of the complaint present no cause of action. It is true that the statutes of

[1] See note at end of case.



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Alaska, as do those of many of the states, remove certain disabilities which at common law attend the wife during her coverture, and declare that neither the husband nor the wife shall have an interest in the property of the other, provide that should either obtain the possession of the property of the other the latter may maintain an action therefor in the same manner and to the same extent as if they were unmarried, and make further provision that neither shall be liable for the other's debts. Such statutes do not mean that the husband is answerable to the wife in damages for failure to supply her with the necessaries of life, or for any other act or failure of duty connected with or arising from the marital relation, and it has never been so held. Such a right of action, it is enough to say, has not been conferred by the statutes of Alaska, is wholly at variance with the theory of the marital relation, and is unknown to English or American jurisprudence.

The judgment of the District Court is affirmed.

## NOTE.

### Rights of Action Between Husband and Wife.

#### I. In General.

[a] (Ala. 1900) It is no defense to a suit of ejectment by a wife against her husband that the lands in question are the family homestead, and that the husband is willing to have the wife share possession of it with him.—Cook v. Cook, 125 Ala. 583, 27 South. 918, 82 Am. St. Rep. 264.

[b] (Fla. 1887) A person imprisoned in the penitentiary for life cannot maintain a suit in equity against his wife and another, to whom she has sold his property, for the purpose of adjusting the respective rights of the three, on an allegation in his bill that the sale is void, and an admission that she has an interest in the property which should be determined; the wife having no interest in his property which can become the subject of suit between them under such circumstances. He has a remedy at law against the purchaser, if the sale was void.—Willingham v. King, 23 Fla. 478, 2 South. 851.

[c] (Ind. 1884) The pending of a suit for divorce precludes the husband from maintaining another suit to enforce a trust for money paid by him for the price of land that had been conveyed by the vendor to the wife.—Rose v. Rose, 93 Ind. 179.

[d] (Iowa, 1906) Frequent unfounded accusations of unchastity by a husband may endanger the life of the wife so as to become a sufficient ground for a suit for separate maintenance.—Shors v. Shors, 110 N. W. 16.

[e] (Ky. 1863) Although there are cases in which a court of equity will lend its aid in the adjustment of conflicting claims arising between husband and wife with respect to their property, yet it is the policy of the law rather to restrict than to enlarge this class of cases. The necessity must be made clearly apparent.—Matson v. Matson, 61 Ky. (4 Metc.) 262.

[f] (Me. 1880) Neither an action of assumpsit on account annexed, nor an action of replevin, can be maintained by a wife against her husband while the connubial relation remains in full force.—Hobbs v. Hobbs, 70 Me. 383.

[g] (Mass. 1835) Where a mother conveyed land to a trustee for the use and benefit of her daughter, with remainder over to the daughter's children, and the daughter left her husband and brought a bill against the trustee to enforce the trust, her husband was rightly joined as defendant on an allegation that he was in receipt of the rents and profits from the estate.—Ayer v. Ayer, 33 Mass. (16 Pick.) 327.

[h] (Mass.) Whether a wife can ever sue her husband, quære.—(1861) Lord v. Parker, 85 Mass. (3 Allen) 127; (1873) Bassett v. Bassett, 112 Mass. 99.

[i] (Mass. 1872) Where the equity of redemption of land upon which a married woman has a mortgage is held by her husband, her right to enter to foreclose is suspended.—Tucker v. Fenno, 110 Mass. 311.

[j] (Mo. 1871) Where property held by a trustee for the benefit of a wife

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and husband jointly has, by the trustee, been conveyed to the husband absolutely, the wife may maintain an equitable action against the husband to reinstate the trust on the ground of misrepresentation and undue influence. —Walter v. Walter, 48 Mo. 140.

[k] (Mo. 1898) A wife may sue her husband in equity during coverture to recover title to her property, which he wrongfully took in his name.—Reed v. Painter, 145 Mo. 341, 46 S. W. 1089.

[l] (N. J. 1901) Where, by articles of separation, a husband covenants to pay to his wife a certain sum per month for her support, and she agrees to accept such payments in satisfaction of alimony, she may maintain an action in her own name to recover past due sums.—Mockridge v. Mockridge, 62 N. J. Eq. (17 Dick.) 570, 50 Atl. 182.

[m] (N. Y. 1879) Where a wife claims as her own, and forcibly carries off, property of her husband, he may maintain an action at law against her to recover it.—Berdell v. Parkhurst, 19 Hun, 358; Same v. Berdell, 58 How. Prac. 102.

[n] (Pa. 1843) A woman between whom and the defendant a marriage in form, binding in law, subsists, cannot treat the marriage as a nullity for the purpose of commencing an action, and sue her husband in fact, as though she were sole. She must first establish the nullity of her marriage by a judicial proceeding instituted for that purpose.—Griffith v. Smith, 1 Pa. Law J. 151, 1 Clark, 479.

[o] (Pa. 1887) A married woman may, under Act April 11, 1848, institute proceedings against her husband for her distributive share of a decedent's estate of which her husband is administrator.—In re Abrahims' Estate, 19 Wkly. Notes Cas. 451, 3 Pa. Co. Ct. R. 379.

[p] (Pa. 1897) In controversies between husband and wife, a right to sue is not obtained by the intervention of a prochein ami, except the wife be under age.—Reinhold v. Reinhold, 7 Pa. Dist. R. 565.

[q] (S. C. 1813) A wife may maintain an action by her next friend against her husband for alimony decreed her by a court of equity.—Prather v. Clarke, Tread. Const. 453.

[r] (S. C. 1836) A wife, by her next friend, may sustain a bill against her husband and the administrator for her distributive share of her father's estate.—Lindsay v. Lindsay, 1 Rich. Eq. Cas. 439.

[s] (Tenn. 1884) Where a husband seeks in equity relief adverse to his wife's interests, he cannot make her a co-complainant. He should make her a defendant.—Lancaster v. Lancaster, 81 Tenn. (13 Lea) 126.

[t] (Tenn. 1885) A wife whose interest is adverse to that of her husband may properly be made a defendant to a bill filed by him.—Doherty v. Choate, 84 Tenn. (16 Lea) 192.

[u] (Tenn. 1898) A petition by a husband against his wife to set off an excess paid her under an improper order, against her demand for alimony, is not demurrable as being an action between husband and wife, since it is a defensive action of the husband, arising in the wife's suit for divorce, against her demand for alimony.—Johnson v. Johnson, 49 S. W. 305.

[v] (Tex. 1905) A husband may maintain a suit against his wife to settle property rights, and the latter, for purposes of the suit, may act independently of him, and is free to act and contract with reference to the case as any other litigant would be.—Newman v. Newman, 86 S. W. 635.

## II. Statutory Provisions.

[a] (Ala. 1900) Under Code, § 2527, providing that a wife must sue alone for the recovery of her separate property, she may bring ejectment against her husband to recover possession of her lands.—Cook v. Cook, 125 Ala. 583, 27 South. 918, 82 Am. St. Rep. 264.

[b] (Iowa, 1893) Code, § 2204, providing that, should either husband or wife obtain control of property belonging to the other before or after marriage, the owner may maintain an action therefor, or for any right growing out of the same, in like manner as if unmarried, does not apply to property voluntarily given by one to the other.—Porter v. Goble, 88 Iowa, 565, 55 N. W. 530.

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[c] (Iowa, 1899) Code 1873, § 2211, providing that a wife may receive wages for her own labor, and sue therefor, and may prosecute all actions for the protection of her rights and property, as if unmarried, gives the wife no right of action as against her husband.—Heacock v. Heacock, 108 Iowa, 540, 79 N. W. 353, 75 Am. St. Rep. 273.

[d] (Me. 1856) Under St. 1848, c. 73, § 1, which authorizes a married woman to prosecute and defend suits in her own name as if she were unmarried, or to prosecute or defend such suits jointly with her husband, no right of action against each other is given to husband and wife, nor any liability to each other for costs imposed in a suit commenced by one, where the other is one of several defendants.—Smith v. Gorman, 41 Me. 405.

[e] (Mo. 1898) Under 2 Rev. St. 1889, p. 1609, § 6865, authorizing a married woman to apply to the circuit court for a decree giving her the sole possession and control of her real estate, which she holds in her own right, where her husband by mistreatment or ill usage has given her cause to live separate and apart from him, the words "in her own right" should not be given a restricted or technical meaning, so as to apply only to cases where the wife has the legal title; but, as the statute is a remedial one, intended to provide a procedure by which a married woman could obtain the possession of her real estate, and receive the rents, issues, and profits thereof, it should be construed so as to carry out its intended business, thus including all real estate of which the wife is the real beneficial owner, whether her title be legal or merely equitable.—Sackman v. Sackman, 143 Mo. 576, 45 S. W. 264.

[f] (Neb. 1904) The common-law disability of husband and wife to maintain suits at law against each other on contracts between them has been removed in Nebraska.—Trayer v. Setzer, 101 N. W. 989.

[g] (N. Y. 1888) Neither Code Civ. Proc. § 450, allowing a wife in an action or special proceeding to appear, prosecute, or defend alone, or with other parties, as if she were single, nor any other statute, authorizes husband and wife to sue each other at law.—Alward v. Alward, 15 Civ. Proc. R. 151, 2 N. Y. Supp. 42.

[h] (Ohio, 1894) Under the statutes relating to married women, an action will lie between husband and wife, and debts due a woman are not extinguished by her intermarriage with the debtor.—Hart v. Sarvis (Com. Pl.) 3 Ohio N. P. 316.

[i] (Ohio, 1895) Under Rev. St. §§ 4947–6793, a married woman may sue in her own name to recover a money judgment against her husband.—Brenneman v. Brenneman (Com. Pl.) 1 Ohio N. P. 332.

[j] (Pa. 1889) Act June 3, 1887 (P. L. 332), the general purpose of which is to confer on married women the same power over their property and earnings, and the same rights and remedies incident thereto, that men have, provides, by section 4, that "husband and wife shall have the same civil remedies upon contracts in their own name and right against all persons, for the protection and recovery of their separate property, as unmarried persons." *Held*, that a wife is not authorized to sue her husband in her own name on a money demand, as it appears that the words "including each other," following "against all persons," were struck out of the section as originally introduced into the Legislature.—Small v. Small, 129 Pa. 366, 18 Atl. 497, 24 Wkly. Notes Cas. 452, reversing (1888) 5 Pa. Co. Ct. R. 538.

[k] (Pa.) Act June 3, 1887, § 4, providing that husband and wife shall have the same legal remedies upon contracts in their own name and right, against all persons, for protection and recovery of their separate property, as unmarried persons, does not give a married woman a right of action against her husband while they are still living together.—(1889) Small v. Small, 129 Pa. 366, 18 Atl. 497; (1896) Kennedy v. Knight, 174 Pa. 408, 34 Atl. 585.

### III. Nature and Form of Remedy.

[a] (Ark. 1906) Where a stipulation, for the dismissal of a suit for divorce, bound the husband to pay certain monthly installments to the wife for her separate maintenance, such installments were, in the nature of alimony,

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o recover which a separate suit in equity was maintainable, as provided by Kirby's Dig. § 2675.—Shirey v. Hill, 98 S. W. 731.

[b] (Ill. 1881) As the statutes confer upon a married woman the same ights respecting her property as are possessed by one unmarried, together vith the right to maintain an action against her husband, it follows that the emedy of a married woman for an injury to her property by her husband is o longer in equity, but at law,—Larison v. Larison, 9 Ill. App. (9 Bradw.) 27.

[c] (N. J. 1899) Equity is the proper forum in which to enforce contracts etween husband and wife.—Bishop v. Bourgeois, 43 Atl. 655.

[d] (N. Y. 1883) In equity, a man may sue his wife, or a wife her husband. —Higgins v. Higgins, 14 Abb. N. C. 13.

[e] (N. Y. 1884) The wife of one of two joint executors may maintain n action against them on a claim due her from their intestate by assignment rom her husband, and need not, because of the marital relation, proceed in he manner that the husband would be compelled to proceed on a claim beonging to him.—Snyder v. Snyder, 5 Civ. Proc. R. 267.

[f] (Pa. 1906) Act June 8, 1893 (P. L. 344), prohibiting a married woman rom suing her husband, was applicable only to actions at law, and was not ntended to deprive a wife of the right she heretofore possessed of invoking he assistance of a chancellor.—Heckman v. Heckman, 215 Pa. 203, 64 Atl. 25.

[g] (Pa. 1906) Under Married Woman's Act April 11, 1848 (P. L. 536), wife may maintain a bill in equity against her husband to protect her eparate estate and enforce her property rights.—Heckman v. Heckman, 215 Pa. 203, 64 Atl. 425.

[h] (Tenn. 1875) The rule is well established that a wife cannot sue her husband, nor sue without him, at law; and if she proposes to recover, or enorce rights adverse to him, or in which he is estopped to recover, her remdy is in a court of equity.—McNail v. Paducah & M. R. Co., 3 Tenn. Cas. 80.

[i] (Vt. 1847) Whenever the interests of the husband and wife are conlicting, the wife is allowed to bring a suit in chancery against her husband, nd the husband against the wife, as if they were sole and unmarried.—Porter v. Bank of Rutland, 19 Vt. 410.

### IV. Actions for Partition.

[a] A wife, owning real estate as tenant in common with her husband, may naintain an action for partition against him.

—(N. Y. 1872) Moore v. Moore, 47 N. Y. 467, 7 Am. Rep. 466.

CONTRA, see

(Vt. 1849) Howe v. Blanden, 21 Vt. 315.

[b] (N. Y. 1871) A partition suit is not authorized, either by the statutes r at common law, between husband and wife, of land conveyed to them and heir heirs and assigns by a deed not indicating that they are to hold as joint enants or tenants in common, or have a severable interest.—Miller v. Miller, Abb. Prac. (N. S.) 444.

[c] (N. Y. 1891) Laws 1880, c. 472, provides that a husband and wife may nake partition between themselves of lands held by them as joint tenants. *Held*, that where a deed of land to a husband and wife, executed after the act f 1880 took effect, expressly provides that the grantees shall hold as joint enants, the husband may maintain an action against his wife for partition f the land so conveyed.—Wurz v. Wurz, 27 Abb. N. C. 58, 15 N. Y. Supp. 20.

### V. Actions for Torts.

[a] (N. Y. 1865) Neither Laws 1862, c. 172, § 3, which provides that a narried woman may bring an action in her own name for any injury to her erson or character, the same as if she were sole, nor Code, § 114, gives a narried woman a right to maintain an action against her husband for slaner.—Freethy v. Freethy, 42 Barb. 641.

[b] (N. Y. 1867) A complaint of a wife, alleging that her husband without er consent has taken money belonging to her, and refused to surrender

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the same on demand, sets forth a good cause of action.—Whitney v. Whitney, 49 Barb. 319.

[c] (N. Y.) Under Laws 1860, c. 90, § 7, authorizing a married woman to "maintain an action in her own name against any person or body corporate for any injury to her person or character," *held*, that she might bring an action against her husband for assault and battery.—(1882) Schultz v. Schultz, 63 How. Prac. 181. CONTRA, see (1863) Longendyke v. Longendyke, 44 Barb. 367.

[d] (N. Y. 1892) The husband can maintain an action against his wife for a conversion by her of his property.—Mason v. Mason, 66 Hun, 386, 21 N. Y. Supp. 306.

[e] (N. Y. 1894) A husband cannot sue his wife to recover damages for deceit by which he was induced to marry her.—Kujek v. Goldman, 9 Misc. Rep. 34, 29 N. Y. Supp. 294, 31 Abb. N. C. 314.

[f] (Pa. 1895) Act June 8, 1893 (P. L. 344), provides that a married woman may not sue her husband except for divorce, and, in certain cases, to protect her property. *Held*, that she cannot sue him for slander.—Mink v. Mink (Com. Pl.) 16 Pa. Co. Ct. R. 189.

[g] (Pa. 1895) The act of June 8, 1893, prohibiting a wife from suing her husband for slander, is not unconstitutional, as violating the bill of rights, which declares indefeasible certain rights,—among them that of protecting reputation.—Mink v. Mink (Com. Pl.) 16 Pa. Co. Ct. R. 189.

[h] (R. I. 1898) Under Gen. Laws, c. 194, § 16, enacting that "in all actions, suits and proceedings, whether at law or in equity, by or against a married woman, she shall sue and be sued alone," and in view of the policy of the statute to give married women free and entire control of their own property, the same as femes sole, a wife may maintain trover against her husband for the conversion of her household furniture.—Smith v. Smith, 20 R. I. 556, 40 Atl. 417.

### VI. Actions Involving Conveyances by Husband in Fraud of Wife.

[a] (Ind. 1888) Under Rev. St. 1881, § 4920, providing that fraudulent conveyances shall be held void "as to persons sought to be defrauded," a wife who obtains a judgment for alimony after a conveyance by her husband of his property, to set aside such conveyance as fraudulent, must, as a subsequent creditor, allege a fraudulent intention therein on his part to defraud his subsequent creditors.—Plunkett v. Plunkett, 114 Ind. 484, 16 N. E. 612; Id., 114 Ind. 484, 17 N. E. 562.

[b] (Kan. 1885) A wife's interest in her husband's real estate is such that she may maintain an action during his life to prevent its wrongful alienation or disposition under fraudulent judgments consented to by the husband for the purpose of defeating the wife's right.—Busenbark v. Busenbark, 33 Kan. 572, 7 Pac. 245.

[c] (N. Y. 1836) Where a husband and wife instituted an action to recover property which it was alleged the defendant held in trust for the wife, and the defendant pleaded that, subsequent to the commencement of the suit, the husband had given a release discharging the defendant, if such release was a fraud the wife was entitled to sue her husband and trustee by her next friend.—Dewall v. Covenhoven, 5 Paige, 581.

### VII. Actions on Contracts in General.

[a] (Conn. 1883) Under Gen. St. p. 187, § 6, providing that a married woman, abandoned by her husband, may "sue and be sued as a feme sole," she may maintain a suit against her husband to procure the setting aside of a conveyance of land obtained by him from her by fraud, undue influence, and duress.—Adams v. Adams, 51 Conn. 135.

[b] (Iowa, 1899) Under Code 1873, § 2204, providing that, should either the husband or wife obtain possession of the property belonging to the other before or after marriage, the owner thereof may sue therefor, or for any right growing out of the same, as if unmarried, a wife has no right of action against her husband on his personal contract.—Heacock v. Heacock, 108 Iowa, 540, 79 N. W. 353, 75 Am. St. Rep. 273.

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[c] (Mass. 1862) A married woman cannot sustain an action against partners, of whom her husband is one, to recover compensation for services performed for them.—Edwards v. Stevens, 85 Mass. (3 Allen) 315.

[d] (Mich. 1883) A married woman may make her husband a party defendant in an action for labor performed by her, for which her husband and others are jointly liable.—Benson v. Morgan, 50 Mich. 77, 14 N. W. 705.

[e] (Mo. 1896) Neither at common law nor under the married woman's act (Rev. St. § 6864) can a husband sue his wife on her contract.—Lindsay v. Archibald, 65 Mo. App. 117.

[f] (N. J. 1897) A wife filed a bill against her husband to recover arrears of an annuity provided for in a separation agreement under seal, in which he, in consideration of covenants of the wife, agreed to pay her $75 per month from the date of the contract. *Held* to be, in effect, a simple action for money due by contract, and not a suit for specific performance.—Buttlar v. Buttlar, 38 Atl. 300.

[g] (N. J. 1897) Though such suit is brought in equity simply because the husband or wife cannot sue the other at law, defendant may avail himself of an equitable defense.—Buttlar v. Buttlar, 38 Atl. 300.

[h] (N. Y. 1870) The plaintiff, a married woman, carrying on no separate business, performed labor and services at request of her husband for the firm of which he was a member. *Held*, that she could maintain an action against the members of the firm, including her husband, for the value of her services.—Adams v. Curtis, 4 Lans. 164.

[i] (N. Y. 1872) An action at law cannot be maintained against a married woman by her husband upon a contract to pay for services rendered to her by him personally.—Perkins v. Perkins, 7 Lans. 19.

[j] (N. Y. 1872) The statutes of 1848 and 1849, for the more effectual protection of the property of married women, and Laws 1862, c. 172, § 7, providing that a married woman may sue and be sued "in all matters having relation to her sole and separate property," do not confer any additional rights or privileges on the husband, or authorize him to sue his wife on a contract made with him.—Perkins v. Perkins, 7 Lans. 19.

[k] (Pa. 1863) Under Married Woman's Act 1856, § 3, allowing a married woman to sue her husband, who is separated from her, in order to recover her separate earnings or property, unliquidated damages for breach of covenant are not property for which she may maintain an action.—Miller v. Miller, 44 Pa. (8 Wright) 170.

### VIII. Actions on Notes and for Money Loaned.

[a] An action at law may be brought by a wife against her husband to recover money loaned by her to him.

—(Miss. 1871) Thoms v. Thoms. 45 Miss. 263;
(N. Y. 1879) Keyser v. Keyser, 1 City Ct. R. 405;
(Pa. 1869) In re Mitchell's Estate, 1 Leg. Gaz. 74.

CONTRA, see
(Pa. 1858) Ritter v. Ritter, 31 Pa. (7 Casey) 396, reversing (1858) 3 Phila. 27; (1861) Appeal of Kutz, 40 Pa. (4 Wright) 90.

[b] (Conn. 1906) Where a wife had not been abandoned by her husband, but voluntarily left him without cause, she was not entitled to sue her husband on an alleged indebtedness for money loaned; such right having been conferred, by Gen. St. 1902, § 4543, only on a married woman abandoned by her husband.—Muller v. Witte, 78 Conn. 495, 62 Atl. 756.

[c] (Conn. 1906) Pub. Acts 1877, p. 211, c. 114 (Revision 1902, §§ 391, 392, 4545, 4546), declares that equality in personal identity and in ownership of property shall replace the unity of all rights in the husband as to the legal status effected by intermarriage. Section 5 (page 212) provides that all persons previously married may, during marriage, enter into a contract with each other, and, on the execution and recording thereof, shall have the legal status established by the act, and section 6 declares the completeness of the legal status thus established, based on the equality of husband and wife in all property rights and interests during marriage, and on its termination by

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death the complete substitution of such status for that previously existing, in that all existing statutes, giving to either husband or wife any rights or interests in the property of the other, either during marriage or after the death of either, other than those involved in the new status established by the act, should be repealed. *Held*, that a wife was entitled to sue on her husband's note for money loaned.—Mathewson v. Mathewson, 79 Conn. 23, 63 Atl. 285.

[d] (Iowa, 1905) Where a wife loans her husband money from her separate estate, taking his note therefor, she has a right, under the express provisions of Code, § 3155, to maintain an action on the same against him during the coverture.—In re Deaner's Estate, 126 Iowa, 701, 102 N. W. 825, 106 Am. St. Rep. 374.

[e] (Ky. 1891) A wife, empowered by a decree to contract, and to acquire and hold property, and authorized to sue and be sued as a feme sole, cannot maintain an action at law against her husband upon a promissory note executed by him to her.—Kalfus v. Kalfus, 12 Ky. Law Rep. 839.

[f] (Ky. 1891) A decree of court conferring upon a married woman the rights and privileges of a feme sole, as authorized by chapter 52 of the General Statutes, does not empower her to sue her husband in an action at law. In the absence of language making it clearly manifest, it cannot be presumed that the statute was intended to make such a striking innovation of the rules of the common law, and one so much opposed to public policy. In this case it is *held* that a wife empowered by decree of court to contract, and to acquire and hold property, and authorized to "sue and be sued" as a feme sole, cannot maintain an action at law against the husband upon a promissory note executed to her by him.—Kalfus v. Kalfus, 13 Ky. Law Rep. 89.

[g] (Ky. 1892) A husband shortly after marriage conveyed one-half of his estate to his wife, and afterwards joined with her in a conveyance of that property and of his own to a trustee for payment of their debts. The wife's debts exceeded the husband's, but from the schedule of the husband's debts was omitted a note of $250 to the wife. *Held*, that a judgment against the husband in favor of the wife, afterwards recovered on that note, was inequitable, and should be reversed.—Kalfus v. Kalfus, 92 Ky. 542, 18 S. W. 366.

[h] (Ky. 1895) In an action by a wife trading as feme sole against the husband to recover on a note executed by him to her, the husband alleged that after his marriage plaintiff induced him to convey to her real estate worth $16,000; that when he married plaintiff she owned a store worth $450, which she ran with his aid for some time, and finally sold for $1,100; that she also owned a house worth $5,000, and that defendant expended $700 in repairing it; that plaintiff received all the rents of defendant's property, and the proceeds of the sales of valuable real estate, so that defendant was penniless; which allegations the wife merely denied generally. *Held*, that plaintiff was entitled to no relief.—Leahy v. Leahy, 97 Ky. 59, 29 S. W. 852.

[i] (Me. 1868) Under Rev. St. 1857, c. 61, § 3, authorizing a wife to "prosecute and defend suits at law or in equity for the preservation and protection of her property as if unmarried," a married woman cannot maintain an action against her husband on a note given by him to her during coverture. —Crowther v. Crowther, 55 Me. 358.

[j] (Md. 1870) A widow may maintain an action at law against the executors of her deceased husband for money which she loaned to him before marriage, and also for the recovery of the value of securities constituting part of her separate estate, and which she loaned to him during marriage upon his express promise to repay her.—Barton v. Barton, 32 Md. 214.

[k] (Mass. 1883) An action may be maintained by a woman upon a promissory note given to her by her former husband after she has obtained a divorce from him, in pursuance of a written agreement made before the divorce, and conditioned upon the divorce being decreed, and which was called to the attention of the court granting the divorce, by the terms of which agreement, which were carried out by each party, she was to convey her land to him and give a release of all her rights of dower and homestead,

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and he was to give her a sum of money and the note in suit, which were to be accepted instead of alimony.—Chapin v. Chapin, 135 Mass. 393.

[l] (N. Y. 1859) A wife may bring an action against copartners, although one of them is her husband, to recover moneys belonging to her separate estate, which she loaned to them.—Devin v. Devin, 17 How. Prac. 514.

[m] (Or. 1894) Hill's Code, § 2997, provides that a married woman may make contracts and incur obligations which may be enforced by or against her to the same extent as if she were unmarried. Section 2871 makes valid a conveyance, transfer, or lien executed by either husband or wife to or in favor of the other. Section 2872 allows a husband or wife to constitute the other an attorney in fact to dispose of property belonging to one for the benefit of both. *Held*, that the general power to contract given by section 2997 is not limited, so far as contracts between husband and wife are concerned, to the contracts provided for in sections 2871, 2872, so as to prevent the wife from suing her husband at law for money delivered to him under an express agreement to repay.—Grubbe v. Grubbe, 26 Or. 363, 38 Pac. 182.

[n] (Pa. 1895) Act June 8, 1893 (P. L. 344), provides that a married woman may not sue her husband except in proceedings for divorce, or in a proceeding to recover her separate property, whenever he may have deserted her without cause, or neglected or refused to support her. *Held* to exclude relief on a bill, by a married woman, living with her husband, alleging a debt due by him for money loaned and an unfulfilled promise to execute a note in her favor.—Johnston v. Johnston, 7 Pa. Dist. R. 555.

[o] (Pa. 1899) Since the married woman's act (Act June 3, 1887) does not authorize a suit by a married woman against her husband, limitations do not run against a note given to a wife by her husband.—In re Wilkinson's Estate, 192 Pa. 117, 43 Atl. 466; Appeal of Cutler, Id.

[p] (W. Va. 1886) When a wife sues her husband at law on a promissory note given by him directly to her, coverture may be pleaded in bar.—Roseberry v. Roseberry, 27 W. Va. 759.

### IX. Actions in Respect to Wife's Separate Property.

*1. In General.*

[a] (Ala. 1891) Code, § 2347, providing in general terms that a wife must sue alone for the recovery of her separate property, is broad enough to include an action of detinue by her against her husband.—Bruce v. Bruce, 95 Ala. 563, 11 South. 197.

[b] (Ga. 1875) It was stipulated in an antenuptial agreement that the husband should reduce such agreement to writing after marriage. The husband, however, failed to do so, but nevertheless held and used the wife's property as her separate estate during the greater part of the coverture intending not to assert his individual rights, but to carry out the terms of the parol contract beneficial to the wife. *Held* that, if a bill is brought by the wife to establish her title to the property so held by the husband as her separate estate, it will not abate by the death of the husband, but will proceed against his representatives.—Bradley v. Saddler, 54 Ga. 681.

[c] (Ill. 1872) Under the acts of 1861 and 1869, abrogating the common-law rule as to married women's property and earnings, the wife may sue her husband for any unlawful interference with her property.—Martin v. Robson, 65 Ill. 129, 16 Am. Rep. 578.

[d] (Ind. 1889) By Rev. St. 1881, § 5116, the wife's lands and the rents and profits are her separate property as fully as if she were unmarried. Section 5129 provides that suits in relation to the wife's lands, if she is separated from her husband, shall be prosecuted in her name alone, and section 254 permits her to sue alone, when the action concerns her separate property, or when the action is between herself and husband. *Held*, that the wife may maintain ejectment against the husband for her separate real property.—Crater v. Crater, 118 Ind. 521, 21 N. E. 290, 10 Am. St. Rep. 161.

[e] (Iowa, 1865) A wife who has left her husband for cause, or been driven away by him without cause, may, under Revision, § 2971, sue him in replevin in her own name to recover possession of her separate property.—Jones v. Jones, 19 Iowa, 236.

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[f] (Ky. 1863) The wife cannot sue the husband to recover possession of slaves devised to her as her separate property free from the control of her husband, which he refuses to deliver to her.—Matson v. Matson, 61 Ky. (4 Metc.) 262.

[g] (Mich. 1856) Without the aid of a statute a wife may sue her husband in equity in respect to her separate property, and by virtue of the statute she may sue in the circuit court for the proper county or in a court of chancery.—Markham v. Markham, 4 Mich. 305.

[h] (Mich. 1885) A wife living apart from her husband can bring replevin against him for her individual property after making due demand therefor.—White v. White, 58 Mich. 546, 25 N. W. 490.

[i] (Minn. 1896) The effect of Gen. St. 1894, § 5530, is to preserve the separate legal existence of a married woman in respect to all her rights of person and property, and, to the extent necessary to the full exercise and protection of these rights, to give her in her own name all the remedies in the courts which she would have if unmarried. Hence she may sue her husband in her own name, in any form of action, to enforce any right affecting her property, the same as if he were a stranger.—Gillespie v. Gillespie, 64 Minn. 381, 67 N. W. 206.

[j] (Miss. 1855) A wife may maintain an action against her husband to protect the title to her separate property.—Pennington v. Ackter, 30 Miss. 161.

[k] (Mo. 1887) Since a wife may sustain the relation of creditor to her husband and maintain a suit against him to recover her separate property, she may, after his death, proceed against his estate for allowance of a claim for her separate estate in his hands.—Todd v. Terry, 26 Mo. App. 598.

[l] (N. J. 1875) Without special circumstances demanding the intervention of equity, a married woman is not entitled to its aid to enable her to obtain possession of her property withheld from her by her husband.—Black v. Black, 26 N. J. Eq. (11 C. E. Green) 295.

[m] (N. Y. 1865) Since a married woman cannot sue her husband at law, a married woman living apart from her husband cannot maintain an action of ejectment to recover leasehold premises which are her separate property and of which he holds possession.—Gould v. Gould, 29 How. Prac. 441.

[n] (N. Y.) The wife may maintain an action against her husband for conversion of her property.—(1867) Whitney v. Whitney, 3 Abb. Prac. (N. S.) 350; (1890) Ryerson v. Ryerson, 55 Hun, 611, 8 N. Y. Supp. 738.

[o] (N. Y. 1870) A married woman may sue her husband to recover the possession of realty from which she is excluded by him.—Minier v. Minier, 4 Lans. 421.

[p] (N. Y. 1879) Where land was conveyed to a wife as her separate property, free from the control of her husband, who assented thereto in writing, she had an equitable estate therein, which the acts of 1848 and 1849 as to married woman's property afterwards converted into a legal title, and she could maintain ejectment for it against the husband and his tenant.—Wood v. Wood, 18 Hun, 350, affirmed (1881) 83 N. Y. 575.

[q] (N. Y. 1880) A wife who, without good cause, is living apart from her husband, may maintain replevin against him to recover articles of her own left in his house and possession.—Howland v. Howland, 20 Hun, 472.

[r] (N. Y. 1886) A husband may sue his wife in a court of law to enforce a contract between them, made for the benefit of her separate estate.—Granger v. Granger, 2 N. Y. St. Rep. 211.

[s] (N. C. 1878) Where an agent is appointed by the wife to manage her separate estate, whether before or after marriage, the husband cannot maintain an action against her and her agent for an account of such management.—Manning v. Manning, 79 N. C. 300.

[t] (Pa. 1869) A wife who has separated from her husband cannot maintain an action against him for her separate property, under Act April 11, 1856, unless she had reasonable cause for leaving him.—May v. May, 62 Pa. (12 P. F. Smith) 206.

[u] (Pa. 1898) Under Act June 8, 1893, giving a married woman a right of action for her separate property against a deserting husband, a wife may

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bring an action on a contract wherein her husband agreed to pay her a certain monthly sum for her maintenance after he had deserted her.—Moorehouse v. Moorehouse, 7 Pa. Super. Ct. 287, 42 Wkly. Notes Cas. 245.

[v] (Tenn. 1877) A woman may, by next friend, maintain a bill against her husband and a third person, who has ejected her from land owned by her in fee at her marriage, to have her rights in the lands set up and declared; and this, although such person has held adversely long enough to bar a joint action by the husband and wife to recover the possession, and although she may not be entitled to possession until her husband's death.—Cantrell v. Davidson Co., 3 Tenn. Ch. 426.

[w] (W. Va. 1894) A widow may maintain an action of detinue against her deceased husband's personal representative for her separate property unlawfully withheld from her, whether acquired from her husband or others.—Good v. Good, 39 W. Va. 357, 19 S. E. 382.

*2. Suits in Equity.*

[a] (Ga. 1856) Where a deed of trust creates a separate estate in the wife, and imposes no duty on the trustee, except that of merely holding the legal title, she may sue the husband or trustee in equity, if they obtain possession.—Wade v. Powell, 20 Ga. 645.

[b] (Mass. 1899) Pub. St. c. 147, § 7, forbidding actions at law between a husband and wife, and providing that it shall not be construed to authorize suits in equity between them, does not prevent a suit in equity by a wife to recover from her husband her separate property, which he had obtained from her by fraud and coercion.—Frankel v. Frankel, 173 Mass. 214, 53 N. E. 398, 73 Am. St. Rep. 266.

[c] (Mo. 1899) The right of a wife to resort to an equity suit against her husband to protect her separate property is not taken away by Rev. St. 1889, § 6869, in the absence of a prohibitory provision, even though it give her a right to sue him at law.—Woodward v. Woodward, 148 Mo. 241, 49 S. W. 1001.

[d] (Mo. 1902) Prior to the enactment in 1889 of what is now Rev. St. 1899, § 4340 [Ann. St. 1906, p. 2382], authorizing a married woman to own "real and personal property as her separate estate, which shall not be liable for her husband's debts," and providing that a married woman may own and in her own name litigate concerning her separate estate, a husband and wife could become creditor and debtor of each other, and enforce their rights in equity as such, where the wife had a separate estate.—Grimes v. Reynolds, 94 Mo. App. 578, 68 S. W. 588.

[e] (Mo. 1904) Prior to the enactment in 1889 of what is now Rev. St. 1899, § 4340 [Ann. St. 1906, p. 2382], authorizing a married woman to own "real and personal property as her separate estate, which shall not be liable for her husband's debts," and providing that a married woman may own and in her own name litigate concerning her separate estate, a husband and wife could become creditor and debtor of each other, and enforce their rights in equity as such, where the wife had a separate estate. Judgment (1902) 94 Mo. App. 578, 68 S. W. 588, affirmed.—Grimes v. Reynolds, 84 Mo. 679, 83 S. W. 1132.

[f] (Pa. 1890) Act April 11, 1848 (P. L. 536), provides that married women shall have the full use and enjoyment of their property, real, personal, or mixed, as fully after marriage as before. Act April 11, 1856 (P. L. 315), provides that when a husband separates himself from his wife, or neglects or refuses to support her, or she shall have been divorced, it shall be lawful for her to protect her reputation by an action for libel or slander, and she shall have the right by an action to recover her separate earnings or property: provided that, if her husband be defendant, the action shall be in the name of a next friend. *Held* that, where husband and wife are living apart, she may maintain equitable ejectment against him for recovery of her separate estate.—McKendry v. McKendry, 131 Pa. 24, 18 Atl. 1078, 25 Wkly. Notes Cas. 189, 6 L. R. A. 506.

[g] (Pa. 1897) A wife cannot sue her husband in equity to recover her separate property, except where the husband has left her without sufficient cause, or fails to support her.—Reinhold v. Reinhold, 7 Pa. Dist. R. 565.

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[h] (Pa. 1895) The ignorance of a married woman as to her rights in her separate estate under the married woman's act, though passed subsequent to her marriage, does not entitle her in equity to reclaim property belonging to her separate estate, the proceeds of which were expended by her husband.—Throckmorton v. Throckmorton, 91 Va. 42, 22 S. E. 162.

*3. Action Against Firm of Which Husband is a Member.*

[a] (Pa.) Where a married woman leases her land to a firm of which her husband is a member, she may, with his consent, obtain judgment against the firm for breach of the covenants in the lease.—(1889) Freiler v. Kear, 126 Pa. 470, 17 Atl. 668, 24 Wkly. Notes Cas. 195, 3 L. R. A. 839; (1890) Id., 133 Pa. 40, 19 Atl. 310.

[b] (Tenn. 1871) A member of a firm married a woman to whom the firm was indebted, settling her estate upon her by marriage settlement. On her bill in equity, *held*, that she might recover the debt from her husband and his co-partners.—Bennett v. Winfield, 51 Tenn. (4 Heisk.) 440.

X. RIGHT OF WIFE TO ALLOWANCE TO MAINTAIN ACTION.

[a] (Iowa, 1906) It was error to order that defendant in a suit for separate maintenance should not be permitted to defend, except upon payment of temporary alimony, where there was no showing as to defendant's property except as made by the petition, its amendments, and the application for temporary alimony.—Hancock v. Hancock, 109 N. W. 1009.

[b] (Iowa, 1906) Code, § 3177, providing that the court may order either party to pay the clerk a sum of money for the separate support and maintenance of the adverse party and the children, and to enable such party to prosecute or defend the action, does not authorize the trial court to grant temporary alimony pending an appeal; the jurisdiction of such a proceeding being transferred to the Supreme Court by the appeal.—Shors v. Shors, 110 N. W. 16.

[c] (N. Y. 1882) Except in actions to procure a separation or divorce, as prescribed by Code Civ. Proc. c. 15, tit. 3, arts. 2, 3, a husband cannot be ordered to pay money to enable his wife to carry on an action against him.—Ramsden v. Ramsden, 28 Hun, 285, affirmed (1883) 91 N. Y. 281.

[d] (Ohio, 1857) Where a wife, living separate from her husband on account of alleged ill treatment, sues to enforce an antenuptial agreement in reference to her property in his possession, and the answer denies the agreement and his possession of any of her property, but does not deny the ill treatment or her destitute situation, the court is authorized to make an order for the payment by the husband of a reasonable allowance pendente lite to enable her to prosecute her suit and to enforce the same by execution.—O'Donnell v. O'Donnell, 1 Disn. 299.

[e] (S. C. 1791) Pending a suit by a wife against her husband to enforce a marriage settlement, the husband was ordered to pay her alimony for the expenses of the litigation.—Wilson v. Wilson, 1 Desaus. 219.

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(149 Fed. 625.)

## RICHARDSON et al. v. LOWE et al.

(Circuit Court of Appeals, Eighth Circuit. October 23, 1906.)

No. 2,242.

1. CONTRACT—RESCISSION FOR FRAUD—TIME FOR EXERCISE OF RIGHT AND CONDITIONS REQUISITE THERETO.

The right to rescind a contract for misrepresentation and fraud must be exercised immediately upon discovery of the fraud, or of sufficient evidence thereof to reasonably warrant such action. The intention to rescind must be manifested by some notice or outward manifestation thereof which will apprise the other party of such intention, and the party entitled to rescind must not vacillate in his purpose, but must consistently adhere to it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 1189.]

2. VENDOR AND PURCHASER—RESCISSION BY PURCHASER—WAIVER OF RIGHT BY LACHES.

Defendants purchased a group of mines that were being worked and at once took possession. Within four months thereafter they claimed to have learned that material misrepresentations had been made by the vendors as to the value and richness of the mines but continued to operate the same both for development and production for two years and until long after suit had been commenced by the vendors to foreclose a mortgage given to secure a note for purchase money, in which they answered setting up the fraud and also filed a cross-bill for rescission, no notice of the intention to rescind having been given to the vendors until the filing of such answer some five months after the fraud was discovered. *Held*, that by such laches they waived and irrevocably lost the right to rescind.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 212–214.]

3. SAME—ACTION FOR PURCHASE MONEY—DEFENSE OF FRAUD.

Although fraud inducing a purchase of property has been waived by laches as a ground for rescission of the contract, yet the purchaser may plead the resulting damages as a failure of consideration in defense of a note given for purchase money, provided he has fully performed on his part.

4. SAME—ACTION FOR PURCHASE MONEY—COUNTERCLAIM FOR DAMAGES ON ACCOUNT OF FRAUD.

If the fraud inducing a purchase of property has been waived by laches as a ground for rescission of the contract, and the vendee has not fully performed on his part, he may not, with full knowledge of the vitiating fraud, continue performance, voluntarily subjecting himself to damage, and afterwards recover therefor.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, § 30.]

5. MORTGAGES—SECURITY FOR PURCHASE MONEY—FORECLOSURE—DEFENSES—FRAUD—CROSS-BILL FOR RESCISSION.

In a suit in equity to foreclose a mortgage given to secure a note for purchase money of property, an answer setting up fraud inducing the sale in defense to the note and a cross-bill for rescission of the contract on account of the same fraud are not inconsistent.

6. VENDOR AND PURCHASER—ACTION FOR PURCHASE MONEY—DEFENSES—FRAUD—PROOF OF DAMAGES.

Where a purchaser of property in defense to a note given for purchase money sets up fraud in the sale, the burden rests upon him to prove that the property was worth less than the price agreed to be paid, and how much less, and where the property consisted of mines the value of which cannot be accurately determined, and is largely speculative a finding by the trial court on conflicting evidence, that such burden has not been sustained by the proof of any damages will not be disturbed on appeal.

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7. EQUITY—BILL OF REVIEW—NEWLY DISCOVERED EVIDENCE.

Leave to file a bill of review on the ground of newly discovered evidence will not be granted, where such evidence is merely cumulative on issues joined and tried in the case or where it is immaterial to the issues upon which the case was decided.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 1092.]

Appeal from the Circuit Court of the United States for the District of Colorado.

This was a bill to foreclose a mortgage executed by Arthur J. Richardson and E. Jennie H. Richardson, defendants below, to secure the payment of a note for $182,500 made by them and payable to the order of Henry B. Lowe and Tyson S. Dines, complainants below. The property mortgaged consists of a number of mining claims known as the "Topeka Group" of mines located in Gilpin county, Colo. Defendants admitted the execution of the note and mortgage, and set up as a defense that the note was given to represent part payment of the purchase price of the mines which they had bought from complainants; that the mines were worthless and known to have been so by complainants when they made the sale; that they were induced to make the purchase by fraud, deceit, and misrepresentation practiced upon them by complainants and for these reasons the note was without consideration and void. Defendants also filed a cross-bill, setting forth the transaction culminating in the purchase of the mines, the false representations made by complainants concerning their values, the fraud practiced by complainants to induce them to make the purchase, payment of one-half of the purchase price by them, a rescission of the contract on the discovery of the fraud and other facts which will be sufficiently referred to later, and prayed that the note and mortgage be canceled, that complainants be decreed to restore to defendants $162,500, the cash payment made for the mines, and to retake title and possession thereof. On these issues the case was heard by the Circuit Court and decided in favor of complainants on their bill of foreclosure and against defendants on the issues presented both by their answer and cross-bill. Defendants appeal.

Charles S. Thomas and William H. Bryant (William F. Malburn, and Don M. Dickinson, on the brief), for appellants.

Charles J. Hughes, Jr., and O. L. Dines (E. E. Whitted, on the brief), for appellees.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The defendants, Mrs. Richardson and her son Arthur, were residents of Erie county, N. Y., and on the death of the husband and father, some 10 years before the events of this suit, became possessed of a large estate which enabled them to make transactions of their own, and which required of them the exercise of business sagacity and management. The mother was co-trustee with one Lindsay in the active management of her late husband's estate and had had considerable experience in mining deals in Wyoming and Colorado. The son was in the prime of young manhood, 23 years of age, and had dealt in mines in Colorado, Wyoming, and Michigan. They both appear by the record to have been fairly sensible and prudent persons. The complainants, Lowe and Dines, were the owners of the Topeka Group of mines, and resided in Denver, Colo. Lowe had the chief management and control of the transaction, which resulted in the sale of the mines to the defendants.

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The alleged fraudulent and false representations mainly relied upon by defendants to secure a rescission of the contract of sale are: (1) the pretension that Lowe was obliged to undergo a dangerous and possibly fatal surgical operation which induced him to sell a mine of wonderful richness below its actual value; (2) the pretension that certain parties denominated the "Boston Parties" were clamoring for the property at the same price he was offering it to defendants; (3) the representations that the mines were of great richness and value as disclosed in certain engineers' reports submitted to defendants to induce them to make the purchase; (4) the representations that the mines were of great value and that the ore in sight was extensive and valuable as stated by Lowe and his agents orally to the defendants. As further ground for rescission it is claimed that there was a suppression of information concerning the expenses of operating the mines and that Lowe corrupted one Townsend while he was acting as the agent or associate of defendants in the purchase by offering and finally paying to him a commission to bring about the sale.

The questions whether the representations specified were made or whether if made they were material or of that sort upon which defendants might rely or whether they were in fact false or whether information was suppressed or whether Townsend was corrupted all received much attention in proof and argument and might afford interesting subjects for discussion, but in the view we take of the question of waiver of the fraud by failure to exercise due diligence to rescind, those questions, so far as the rescission of the contract is concerned, do not require consideration at our hands, and we accordingly refrain from so doing and proceed to a consideration of the evidence relating to the time when defendants acquired knowledge of the alleged falsity of the representations and reports concerning the character and value of the mines and the other alleged fraudulent conduct of Lowe. The proof discloses that defendants took possession of the mines with Townsend acting as their superintendent or general manager immediately on the consummation of the purchase, October 27, 1899; that they found soon after taking possession that the rich free gold which had been represented to be in a stope known as the Klondike stope was not there; that as early as December, 1899, they suspected that Townsend had received a commission from Lowe; that some time in January, 1900, they believed the reports and statements concerning the character and value of the mines upon which they claim to have relied in making the purchase were untrue. On February 24, 1900, according to the averments of the cross-bill and amended cross-bill of Arthur Richardson he and his mother had ascertained the fraudulent character of the transaction and rescinded the contract; he avers "that they have never from that time to this acknowledged in any way, shape or form that said note was binding upon them, but they have repudiated the entire transaction and they now repudiate the same." On that day Townsend was discharged as superintendent and one Nichols substituted in his place. On May 12, 1900, this foreclosure suit was instituted. On July 2, 1900, both Arthur Richardson and Mrs. Richardson filed

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answers and cross-bills for relief on the ground of fraud. On November 28, 1900, Arthur filed an amended cross-bill and on a later date Mrs. Richardson filed a like amended cross-bill. From the foregoing we conclude that defendants discovered the fraud, if any there was, as early as February, 1900. Upon such discovery their rights and duties became clear. They had two remedies, one was to rescind the contract by reason of the fraud and the other to affirm the contract notwithstanding the fraud. If they proposed to rescind, their duty was to assert that right promptly, unconditionally and unevasively, otherwise the affirmation of the contract, notwithstanding the fraud, would follow.

In Grymes v. Sanders, 93 U. S. 55, 62, 23 L. Ed. 798, the Supreme Court by Mr. Justice Swayne stated the rule thus:

"Where a party desires to rescind upon the ground of mistake or fraud he must, upon the discovery of the facts, at once announce his purpose, and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted."

In Shappiro v. Goldberg, 192 U. S. 232, 24 Sup. Ct. 259, 48 L. Ed. 419, the Supreme Court by Mr. Justice Day says:

"It is well settled by repeated decisions of this court that where a party desires to rescind upon the ground of misrepresentation or fraud, he must upon the discovery of the fraud announce his purpose and adhere to it [citing Grymes v. Sanders]. If he continues to treat the property as his own the right of rescission is gone, and the party will be held bound by the contract. * * * If he choose the latter remedy [rescission] he must act promptly—announce his purpose and adhere to it, and not by acts of ownership continue to assert right and title over the property as though it belonged to him."

This court, in Burnes v. Burnes, 70 C. C. A. 357, 137 Fed. 781, and Burk v. Johnson (C. C. A.) 146 Fed. 209,[1] citing many authorities in support, announced the same doctrine. These, without citing other well-known cases to the same point, sufficiently affirm the proposition that defendants upon discovering complainants' fraud had an instant duty to perform. If they would repudiate the contract by reason of that fraud they should thereafter have treated the property as they would have done the property of complainants found in their possession and not as their own property. How did defendants' conduct square with this well-settled rule of law? They employed Nichols to succeed Townsend as superintendent and general manager of the mine, and notwithstanding they claimed to have rescinded the contract on that day, they authorized him to do the best he could with the mines, and to work them to the best advantage. Nichols remained as superintendent until November, 1899, and says in his testimony that he worked the mines to the best advantage. The proof shows no substantial change in mining operations after the alleged rescission. Nichols kept right on with development work, practically as Townsend had done, drifting, cross-cutting, stoping, upraising, breaking down, and shipping ore and selling the same until November, when he resigned and was succeeded by one Beals, who, under Arthur Richardson's direction, drove levels and did other development work until

[1] 76 C. C. A. 567.

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December, 1901. In May and June after the alleged rescission Nichols eased to numerous miners various parts of the mine for operation on shares, and so far as we can discover from the voluminous record before us the mines were worked both for development and producing purposes in the spirit of the instructions given Nichols when he succeeded Townsend as superintendent. In that part of appellants' brief where counsel discuss the value of the mine they well sum up the character of the operations after the time appellants discovered the alleged fraud and after the alleged rescission as follows:

"In February, 1900, he [Townsend] was summarily removed as manager and his connection with the appellants was thereby permanently ended. One John Nichols, an old experienced and competent miner was installed as manager in his stead, who, for months thereafter, and until October, 1900, vainly sought to locate and exploit the marvelous bodies of ore recounted in the reports of Mr. Lowe's experts and by his own representations."

The exploitation and operation of the mines as shown by the record not only after the admitted knowledge of the fraud, but after the defendants had pleaded it as a ground of rescission of the contract of purchase are totally inconsistent with the right of rescission. They evince a continued ownership and interest in the mines rather than a repudiation of the contract and a holding of the mines for the benefit of the vendors, and afford conclusive evidence that the vendees waived the fraud and affirmed the contract of purchase. Counsel for the vendees seek to avoid this result by claiming: (1) That the vendees were entitled to a lien on the mines to secure the repayment of the first installment of purchase money paid by them; (2) that the work on the mines was done pending negotiations for a settlement; (3) that the work was done to secure evidence of the worthlessness of the mines.

It may be conceded that the vendees might in case of success in their suit for rescission be decreed to have a lien on the property sold for the amount of their cash payment, and also that the vendees might have been justified in taking samples of ore and making reasonable experiments with the mines for the purpose of securing proof for use in the pending litigation, but neither of these concessions avail them for the present purpose. If they were entitled to hold possession to preserve their lien they would clearly be entitled to do such acts and such acts only as were reasonably necessary for and consistent with that purpose. Any other or further acts would be manifestly for some other purpose. Likewise, if they might take samples and otherwise prepare evidence for the trial, only such samples and other experimental work as would reasonably subserve that purpose would be justified. But neither of these purposes, in our opinion, required the breaking down, shipping and selling of ore, running levels and making cross-cuts and other acts of development and prospecting shown by the proof in this case. The vendees obviously had some other purpose in doing all this work, and it must, in our opinion, be referred to their own interests as owners of the mines which they had purchased and which they had determined to keep, notwithstanding any frauds practiced upon them by the vendors.

Again it is urged that the work was done on the mines pending



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negotiations of settlement of the controversy between the parties and was therefore excusable. This excuse, in our opinion, is without merit. A careful examination of the record fails to disclose any attempt to settle the controversy presented by the pleadings in this case. As early as November 4, 1899, the subject of securing an extension of the time for making the second payment for the mines arose. In a letter from Mr. Lindsay (co-trustee with Mrs. Richardson of her late husband's estate) addressed to Mr. Lowe he says amongst other things:

"It would probably not inconvenience you to divide this second payment of $182,500 into 10 equal payments of $18,250, one to be paid December 12th next, and one on the 12th of each succeeding month; the last being paid in nine months from December 12th, each note bearing interest at 6 per cent. per annum. Had such an arrangement been originally made you would have deemed it reasonable, and you will also, I think, concede that the amounts of payment and dates of same were acceded to by the purchasers without mature reflection. Your consent to this plan will give us the needed time in which to provide for the payment * * * etc."

The proof shows that the purchasers did not have the ready money to make payment of the second installment; that they had expected to pay it out of the earnings of the mines or the sale of stocks belonging to their deceased ancestor's estate. Being disappointed in getting the money from these sources efforts to secure extensions of time in which to make the final payment were from time to time made, and these efforts, which we understand recognized the obligation of the purchasers to make the payment in full, seem from the proof to be the only negotiations to which general reference is made in the pleadings. No demand seems to have been made by the vendees for damages sustained by misrepresentation or fraud in bringing about the contract, and we discover no negotiations for the settlement of any such demand. In making the foregoing statement we confine ourselves to time antecedent to filing the cross-bills by defendants. We recognize that there is some evidence of an attempt at compromising, begun a long time after the case was at issue, in June, 1901, but such negotiations manifestly afford no ground for excusing defendants' prior conduct. As a further and conclusive answer to the contention that the vendees' conduct was excused by the pendency of negotiations for a settlement, attention is called to the fact that the operation of the mines by the vendees continued after the bill for foreclosure was filed and after the first answers and cross-bills were filed thereto for several months at least, practically the same as before. As a result of a most careful and painstaking consideration of the conduct of the vendees after February 24, 1900, as disclosed by the proof, we confidently assert that the purpose to rescind the contract by reason of the frauds alleged was never entertained by the defendants until they filed their answers and cross-bills in July, 1900. We find no evidence until then of any notice to complainants of such purpose. Up to that time they were silent and for months afterwards they exercised many acts of absolute ownership. They planned for and executed schemes for further development of the mines totally inconsistent with their present pretension of having repudiated their contract of purchase on February 24th. Rescission of a contract on the ground of fraud is not a mental process undis-

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closed and unacted upon. It requires affirmative action immediately on its discovery; some overt act and outward manifestation of the intention to clearly apprise the other party to the contract of the right asserted. Melton v. Smith, 65 Mo. 325; Walters v. Miller, 10 Iowa, 427. No case has been brought to our attention which presents a clearer illustration of the doctrine of waiver of fraud and election to abide by the contract as made than this. The following cases afford apt and persuasive authority for the application of the doctrine to this case: Romanoff Mining Co. v. Cameron, 137 Ala. 214, 33 South. 864; Shiffer v. Dietz, 83 N. Y. 300; Booth v. Ryan, 31 Wis. 45; Greenwood v. Fenn, 136 Ill. 146, 26 N. E. 487; Dennis v. Jones, 44 N. J. Eq. 513, 14 Atl. 913, 6 Am. St. Rep. 899; Downer v. Smith, 32 Vt. 1, 76 Am. Dec. 148. The duty of rescinding arises immediately upon acquiring knowledge of the substantial and material facts constituting the fraud. It is not requisite that the defrauded party shall be acquainted with all the evidence constituting the fraud before the duty to act by way of rescission arises. Campbell v. Flemming, 1 A. & E. 40; Fry on Specific Performance of Contracts (2d Ed.) §§ 703, 704; Bach v. Tuch, 126 N. Y. 53, 26 N. E. 1019; Taylor v. Short, 107 Mo. 384, 17 S. W. 970. When he has evidence sufficient to reasonably actuate him to rescind the contract and on which he has once acted no subsequent discovery of cumulative evidence can operate to excuse waiver of the fraud if one has in the meantime occurred or to revive a once lost right of rescission. The election to waive the fraud once deliberately made is irrevocable. Vacillation or speculation cannot be tolerated. See cases supra.

In the view we have taken of the question already discussed, we find no occasion for considering or determining the interesting questions discussed by counsel touching the effect of a failure to restore or offer to restore the property conveyed before suit was brought or the inability at the time the issues were made up or the case tried to place the vendors in statu quo. The election to affirm the contract notwithstanding the fraud renders a discussion of these questions unnecessary. The further question requiring attention relates to the issue of failure of consideration of the note which affords the foundation of complainants' foreclosure suit, raised by defendants' answers. These answers charge that complainants concocted a scheme to cheat and defraud the defendants out of $365,000 in money without giving them any consideration therefor, and to that end that the complainants made the alleged false representations, statements and reports concerning the value of the mines, which have already been considered in the forepart of this opinion; that defendants in reliance upon them were induced to make the contract obligating themselves to pay $365,000 for the mines and to execute in part payment thereof the note in question. They further allege that the mines were practically worthless, and that by reason of these facts there was no consideration for the note in question or that the consideration failed.

Counsel for complainants first contend that the same fraud on which the cross-bill for recission was based is made the basis of this defense, and as that fraud was so waived as to prevent recission, the conse-

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quences of it cannot be availed of on the plea of failure of consideration to diminish the amount due on the note secured by the mortgage. If the contract at the time of the discovery of the fraud were executory this contention would be sound. The vendees, with full knowledge of the vitiating fraud would not be permitted to go on and perform the contract, voluntarily subjecting themselves to damages, and afterwards to sue for and recover the same. Their waiver of the fraud by such performance of the contract would doubtless be for all purposes and would bind them to the contract in like manner as they would have been bound if the falsity of the representations had been known and fully understood before the execution of the contract. The waiver after knowledge of the fraud constitutes full affirmation and ratification of the contract, notwithstanding the fraud.

In Simon v. Goodyear Metallic Rubber Shoe Co., 44 C. C. A. 612, 105 Fed. 573, 579, 52 L. R. A. 745, Judge Lurton speaking for the Circuit Court of Appeals for the Sixth Circuit says:

> "If the fraud be discovered while the contract is wholly executory, the party defrauded has the option of going on with it or not, as he chooses. If he executes it, the loss happens from such voluntary execution, and he cannot recover for loss which he deliberately elected to incur."

So in Kingman v. Stoddard, 29 C. C. A. 413, 85 Fed. 740, where this subject is considered in the light of the authorities a palpable distinction is made between the effect of waiving a fraud before and after the performance of a contract induced by it. The reason for nonliability in cases where the vendee has, with knowledge of it, waived the fraud before the performance of the contract has no application to a case like that now before us. Here the vendees had fully performed their contract, paid for and taken possession of the mines purchased, expended about $75,000 in equipping them with new machinery and had conducted much exploration work prior to the discovery of the alleged fraud. To hold in such a case that because of a state of facts which prevents total rescission of the contract there can be no recovery for the deceit would, in our opinion, deny a well-recognized remedy to the injured party. But it is said that damages occasioned by the fraud and deceit cannot be recovered by defendants on a plea of failure of consideration for the note given. This is not so. The note was given for a thing supposed to be of value and was so represented by complainants. If it had no value and the representations were material, false and relied upon there was no consideration for the note and complainants ought to have no relief by reason of the note. The consequence of the fraud and deceit may be availed of to defeat in toto the complainants' right of action on the note or if the same occasioned only a partial diminution of the value, in mitigation of damages. Withers v. Greene, 9 How. (U. S.) 213, 13 L. Ed. 109; Van Buren v. Digges, 11 How. (U. S.) 461, 13 L. Ed. 771; Zimpelman v. Hipwell, 4 C. C. A. 609, 54 Fed. 848; Boggs v. Wann (C. C.) 58 Fed. 681; Rotan v. Nichols, 22 Ark. 247.

Again it is urged that the two defenses based on the alleged fraud, the failure of consideration for the note and rescission of the contract are inconsistent defenses and cannot both stand. The same facts are

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pleaded in both defenses and the two different theories are undoubtedly presented by counsel out of abundant precaution to present some theory of law to warrant relief on the facts as they might turn out to be. If the facts should justify a recission the relief would be greater than if only a diminution of damages could be awarded.

In Daniell's Ch. Pl. & Pr., vol. 1, *page 713, the author lays down the following rule:

"A defendant may, by his answer, set up any number of defenses, as the consequence of the same state of facts, which his case will allow, or the ingenuity of his legal advisers may suggest."

Chancellor Wolworth, in Hopper v. Hopper, 11 Paige Ch. (N. Y.) 46, says:

"A defendant in this court in an answer may set up as many defenses as he pleases. The different parts of his answer, therefore, are not to be construed in the same manner as the different parts of a plea would be in this court, or even in a court of law. * * * He cannot set up two distinct defenses therein which are so inconsistent with each other that if the matters constituting one defense are truly stated the matters upon which the other defense is attempted to be based must necessarily be untrue in point of fact."

This, as we understand, lays down the test to be whether the facts pleaded in the different defenses can or cannot physically coexist. Tested by the rule indicated in the foregoing authorities there can be no doubt that in this equitable proceeding the answer and the cross-bill are consistent. There might well coexist facts warranting the vendees in exercising the right of rescission which, if they waived, might also entitle them to damages. The exigencies of the trial alone might determine which would be most available to the defendant.

Woods, Circuit Judge, later Associate Justice of the Supreme Court, in the case of Hicks v. Jennings (C. C.) 4 Fed. 855, dealt with a similar question and took occasion to say:

"A court of equity would not allow a decree upon the note and mortgage in suit and then turn the defendant over to another suit to recover the amount out of which he had been wronged by the fraud and falsehood of the complainant. Having the parties before it, it would adjust the controversies between them springing out of the same transaction, according to equity and good conscience."

Reference to that opinion discloses that Judge Woods recognized as this court has done in Wilson v. New United States Cattle Ranch Co., 20 C. C. A. 244, 73 Fed. 994, a difference between the rule applicable to an action in a court of law as distinguished from a proceeding in equity. Having disposed of these preliminary questions we are now brought to the question of fact. Assuming, but not deciding, that complainants were guilty of the false representations, deceit or fraud complained of, were the defendants damaged thereby? If so in what amount?

The measure of damages, if any, in cases of this kind, is the difference between what the vendees parted with and the actual value of what they received. Stratton's Independence Limited v. Dines, 135 Fed. 449, 68 C. C. A. 161 and cases there cited. The burden was on defendants to prove not only that the mines which they received were of less value than $365,000 which they paid for them, but to prove how

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much less was their value. They made their proof as best they could and have brought to this court the record on this subject, and on this record we are asked to find and decree that the note was without consideration in whole or in part and if in part, what part. Can we do so? The property which we are asked to value and say how much, if anything, less than $365,000 it was worth in 1899 consists of several mining claims partially developed, and which during seven or eight years before 1899 had produced the average value of $9 to $11 per ton. This property, from its nature, is of doubtful and uncertain value. No one can peer into the bowels of the earth and tell us with accuracy what is found there. It is so difficult to determine even the quantity and value of ore in sight that the Supreme Court in Southern Development Co. v. Silva, 125 U. S. 247, 252, 8 Sup. Ct. 883, 31 L. Ed. 678, says:

"It is at best a mere matter of opinion. It cannot be calculated with mathematical or even with approximate certainty. The opinions of expert miners, on a question of this kind, might reasonably differ quite materially."

These observations are made by the Supreme Court concerning an estimate of ore actually "in sight" as that term is understood among miners. But that court in the same case goes further, and, quoting with approval from Tuck v. Downing, 76 Ill. 71, 94, says:

"No man, however scientific he may be, could certainly state how a mine, with the most flattering outcrop or blowout, will finally turn out. It is to be fully tested and worked by men of skill and judgment. Mines are not purchased and sold on a warranty, but on the prospect. 'The sight' determines the purchase. If very flattering, a party is willing to pay largely for the chance. There is no other sensible or known mode of selling this kind of property. It is, in the nature of things, utterly speculative, and every one knows the business is of the most fluctuating and hazardous character. How many mines have not sustained the hopes created by their outcrop."

From such approved reflections concerning the character of the property which defendants purchased, and which we are now asked to say was worth less than they paid for it we find that we are dealing with a subject uncertain in actual value, and which, from the speculative feature involved in dealing in it, becomes almost impossible to accurately value. Notwithstanding these difficulties, we have given the testimony on both sides our most careful consideration.

The defendants introduced a dozen witnesses or more, some of whom qualified as experts and some did not, some of whom testified concerning their observation and experience in the mines, and some of whom testified to taking samples of ore from the mines, which were afterwards assayed. These experts and witnesses generally testified concerning the condition of the mines as they appeared after the defendants took possession in the fall of 1899 and during the summer of 1900. The general tendency of their testimony shows that the mines were of little or no value. The methods resorted to in securing the samples and the results indicated by them are characterized as unfair and unreliable by complainants' counsel. Complainants introduced an equal or greater number of witnesses in support of their contention touching the value of the mines. They produced experts who claimed to have made recent exhaustive and accurate examinations of the mines and found them to be of great value. They introduced

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miners who had worked in the mines both before and after defendants took possession who gave evidence tending to show the continued existence of a good mine. Considering the great volume of this evidence, the mass of detail found in it, the irreconcilable and contradictory statements of witnesses as well as the uncertainty of inference to be drawn from the facts, we find ourselves unable to say that the mines in question were worth less than the amount paid for them, and much more are we unable to say how much less they were worth. Any conclusion on this subject rests largely upon conjecture and surmise, and these we cannot indulge. The defendants upon whom the burden rested have failed to satisfactorily show how much, if anything, should be allowed them as damages for the fraud and deceit charged by them.

Judge Hallett, who tried this case in the Circuit Court, is a man of great experience in the trial of mining cases and his findings on conflicting evidence are not only presumptively correct (Stearns-Roger Mfg. Co. v. Brown, 52 C. C. A. 559, 114 Fed. 939), but specially appreciated by us in this case. Speaking of the value of ore in the mines at the time of the sale, and specially of the proof of the defendants tending to show that complainants' representations as to value were false, he makes use of the following language:

"The respondents rely mainly upon the work which they did in the premises and the results which they obtained from getting the ore treated to show that the representations were in the first place false. I do not believe that this affords a fair test; at all events, the testimony on that point is met by a very considerable volume of testimony on the other side as to the previous yield of the mine and it leaves the whole subject in doubt, so that it cannot be said that the facts are established."

Unless we are prepared to say that the learned judge made a serious mistake in his consideration of the facts we ought not to disturb the conclusion reached by him. Stearns-Roger Mfg. Co. v. Brown, supra, and cases cited.

It results from what has been said that the decree below was for the right party, and it is therefore affirmed.

PER CURIAM. The motion filed in this case by appellants for leave to file in the court below a bill of review on the ground of newly discovered evidence must be denied for two reasons: First, the alleged newly-discovered evidence, after a careful examination of the motion and proposed bill and supporting affidavits, is found to be corroboratory of the witnesses examined at the trial, or cumulative on the issues joined in the case and heard, and as such, under well settled principles, does not warrant a reopening of the case. Second, the newly discovered evidence relates to the fraud and misrepresentation alleged in the original cross-bill to have been practiced by the appellees to bring about the purchase of the mines by appellants. It will be observed in the opinion rendered on the appeal, handed down simultaneously with this that a decision of the case is reached notwithstanding the perpetration of the fraud complained of. The newly discovered evidence is therefore immaterial.

The motion is denied.

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(149 Fed. 636.)

## EDELSTEIN v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 30, 1906.)

No. 2,406.

1. BANKRUPTCY—PETITION—REQUISITES.

Where a petition of creditors to have a debtor declared a bankrupt failed to aver that the debtor was not a wage earner or a person engaged chiefly in farming or in tilling the soil, as required by Bankr. Act July 1, 1898, c. 541, 30 Stat. 547, [U. S. Comp. St. 1901, p. 3423], as amended (section 4), the petition was demurrable and insufficient to sustain an adjudication if timely objection was made thereto.

2. JUDGMENT—BANKRUPTCY—ADJUDICATION—COLLATERAL ATTACK.

Where, after a debtor had been adjudged a bankrupt, he recognized the validity of the adjudication, and applied for a discharge from his debts, and there was no appeal taken, the adjudication was not subject to collateral attack because of a defect in the petition, in a proceeding against the bankrupt for taking a false oath.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 913, 914; vol. 6, Bankruptcy, §§ 142, 143.]

3. SAME—VERITY.

Where judgments are rendered in bankruptcy proceedings on questions arising therein, they possess all the incidents and qualities of finality and conclusiveness appertaining to judgments of courts of general jurisdiction, and, unless reversed on appeal or writ of error, import absolute verity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 907, 908; vol. 6, Bankruptcy, §§ 142, 143.]

4. BANKRUPTCY—DEFENSES—"FALSE OATH"—STATUTES—CONSTRUCTION.

Bankr. Act July 1, 1898, c. 541, § 29, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3433], provides that a person shall be punished by imprisonment on conviction of having knowingly and fraudulently made a false oath or account in or in relation to any proceeding in bankruptcy, and Act July 1, 1898, c. 541, § 2, subd. 12, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3421], imposes the duty to discharge or refuse to discharge bankrupts on courts of bankruptcy as one of the "bankruptcy proceedings." Act July 1, 1898, c. 541, § 30, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3434], authorizes the Supreme Court of the United States to prescribe all necessary rules, forms, and orders for carrying the act into effect, pursuant to which general order No. 12 was adopted, declaring that applications for a discharge shall be heard and decided by the judge, with authority to refer the application or any specified issue to a referee to ascertain and report the facts. *Held*, that the term "false oath" was not limited to the examination of the bankrupt, authorized by Act July 1, 1898, c. 541, § 7, subd. 9, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3425], nor to false swearing in connection with the bankrupt's schedules, but related to any proceeding in bankruptcy, including the examination of the bankrupt before a referee on an investigation of specifications filed against his discharge.

5. WITNESSES—BANKRUPTCY PROCEEDINGS—IMMUNITY—EXTENT OF.

Bankr. Act July 1, 1898, c. 541, § 7, subd. 9, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3425], provides for the examination of a bankrupt at the instance of his creditors, and declares that no testimony given by him shall be offered in evidence against him in any criminal proceeding. *Held*, that the examination contemplated by such section relates to past transactions; that the words "in any criminal proceeding" are limited to proceedings arising out of the conduct of the bankrupt's business, the disposition of his property, etc.; that the immunity provided for is limited to protecting the bankrupt from the use of his evidence in such criminal proceed-

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**ings as arise out of the conduct of his business or the disposition of his property, etc., and does not protect him from prosecution for false swearing in giving his evidence.**

**6. SAME.**

**Section 7, subd. 9, supra, does not grant immunity to the bankrupt from prosecution for testifying falsely in a proceeding to investigate the truth of specifications filed against his discharge.**

**Philips, District Judge, dissenting in part.**

In Error to the District Court of the United States for the District of Minnesota.

**On January 12, 1904, the defendant, Edelstein, and his partner, Jacob Harris, were adjudicated bankrupts by the District Court of the District of Minnesota on the petition of certain of their creditors. Later the bankrupts filed their application for discharge, to which several of their creditors objected, and specified grounds therefor as follows: "That within four months subsequent to the first day of the four months immediately preceding the filing of the petition in bankruptcy herein, they did knowingly and fraudulently transfer, remove, and conceal, and permit to be removed and concealed, certain of their property with the intent to hinder, delay, and defraud their creditors, as follows: That on said 30th day of September, 1903, said bankrupts shipped and consigned to said Morris Edelstein from St. Paul to Eveleth, Minnesota, a certain shipment of woolens, trimmings, and other merchandise, with intent to remove and conceal the same, for the purpose of hindering, delaying and defrauding their creditors, and they did thereafter conceal the same from their creditors for that purpose." Thereafter, on April 4, 1904, pursuant to the provisions of general order in bankruptcy No. 12, the specifications against their discharge were by an order of court referred to a referee in bankruptcy, to take the evidence of the parties in interest in respect of the matter set forth in them, and to report the evidence taken, with his findings thereon, for the information of the court. During this investigation Edelstein was sworn as a witness by the referee, and examined relative to the matter before him. Among other questions, he was asked the following: "Did any of the goods which are alleged to have been shipped September 30, 1903, by your firm to you from St. Paul to Eveleth ever come into your possession?" To which he answered, "No, sir." Later defendant Edelstein was indicted for the crime of having made a false oath "in relation to a proceeding in bankruptcy," as denounced by section 29, subd. 2, of the bankruptcy act. Act July 1, 1898, c. 541, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3434]. He was found guilty as charged, and sentenced to a term of one year and three months in the Minnesota penitentiary. A writ of error prosecuted by him brings before us for review several assignments of error, which will be specified as the opinion proceeds.**

Daniel W. Lawler, for plaintiff in error.
Chas. C. Houpt, for defendant in error.

Before VAN DEVANTER and ADAMS, Circuit Judges, and PHILIPS, District Judge.

ADAMS, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Counsel for defendant urges several reasons for a reversal of the judgment: (1) Because the District Court, as a court of bankruptcy, had no jurisdiction of the proceedings in which defendant was charged to have made the false oath. (2) Because the testimony given by defendant before the referee could not be a "false oath," within the meaning of the act. (3) Because the testimony given by him afforded no ground for the prosecution, by reason of the immunity provided

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for in section 7, subd. 9, of the act. Act July 1, 1898, c. 541, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3425].

The first contention is presented in a double aspect: First, that it does not appear from the petition upon which defendant was adjudicated a bankrupt, which was offered in evidence by the government and received against the objection and exception of defendant, that he was not "a wage earner or a person engaged chiefly in farming o the tillage of the soil"; and, second, that the indictment fails to ave that defendant was not within the class just mentioned, and for that reason failed to charge a criminal offense.

The petition of the creditors was in the approved form, except that it failed to aver that the bankrupts were not wage earners or persons engaged chiefly in farming or the tillage of the soil, as required by section 4 of the bankruptcy act as amended. For want of such averment, the petition was demurrable, and if timely objection had been made to it no adjudication could have been had upon it. C. C. Taft Co. v. Century Savings Bank, 72 C. C. A. 671, 141 Fed. 369; In re Plymouth Cordage Co., 68 C. C. A. 434, 135 Fed. 1000; Beach v. Macon Grocery Co., 57 C. C. A. 150, 120 Fed. 736; In re Taylor, 42 C. C. A. 1, 102 Fed. 728. But after a hearing was had, an adjudication of bankruptcy made, and the bankrupt, recognizing its validity, had applied for a discharge from his debts, can it be said that such an adjudication, when no person interested has questioned its validity by appeal or otherwise, is void upon collateral attack? We think not. It is true the District Court as a court of bankruptcy is one of limited jurisdiction—that is, limited in respect of the subjects over which it may exercise jurisdiction—but it is unlimited in respect of its power over proceedings in bankruptcy, specifically made subject to its jurisdiction by section 2 of the act. When judgments are rendered by that court upon questions arising in such proceedings, they possess all the incidents and qualities of finality and conclusiveness appertaining to judgments of courts of general jurisdiction. Its judgments, unless reversed on appeal or writ of error, import absolute verity.

Chief Justice Marshall, early, in the case of Kempe's Lessee v. Kennedy, 5 Cranch, 173, 185, 3 L. Ed. 70, speaking for the Supreme Court of the United States, said:

> "The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous if the jurisdiction be not shown upon them. Judgments rendered in such cases may certainly be reversed, but this court is not prepared to say that they are absolute nullities, which may be be totally disregarded."

In McCormick v. Sullivant, 10 Wheat. 199, 6 L. Ed. 300, the Supreme Court, speaking by Mr. Justice Washington, in answer to the argument that the proceedings were void because jurisdiction of the court was not shown, said:

> "[The argument] proceeds upon an incorrect view of the character and jurisdiction of the inferior court of the United States. They are all of limited jurisdiction; but they are not on that account inferior courts, in the technical sense of those words, whose judgments, taken alone, are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error or appeal, be reversed for that cause. But they are not absolute nullities."

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In Grignon's Lessee v. Astor, 2 How. 318, 341, 11 L. Ed. 283, the Supreme Court, speaking by Mr. Justice Baldwin, said:

"These principles are settled as to all courts of record which have an original general jurisdiction over any particular subjects; they are not courts of special or limited jurisdiction; they are not inferior courts, in the technical sense of the term, because an appeal lies from their decision. * * * They have power to render final judgments and decrees which bind the persons and things before them conclusively, in criminal as well as civil causes, unless revised on error or by appeal."

In Dowell v. Applegate, 152 U. S. 327, 340, 14 Sup. Ct. 611, 616, 38 L. Ed. 463, the Supreme Court, speaking by Mr. Justice Harlan, after reviewing the authorities, observed as follows:

"These cases established the doctrine that, although the presumption in every stage of a cause in a Circuit Court of the United States is that the court is without jurisdiction, unless the contrary affirmatively appears from the record (Bors v. Preston, 111 U. S. 252, 255, 4 Sup. Ct. 407, 28 L. Ed. 419, and the authorities there cited), yet if such jurisdiction does not so appear, the judgment or final decree cannot, for that reason, be collaterally attacked, or treated as a nullity."

See, to the same effect, Freeman on Judgments, vol. 1, § 124; In re Columbia Real Estate Co. (D. C.) 101 Fed. 965, 970.

In view of the principles so announced, it must be held that it was the duty of the court of bankruptcy primarily to find the facts, and determine therefrom, as a matter of law, whether it had jurisdiction over the proceeding before it. It performed its duty, reached the conclusion that it had, and pronounced judgment accordingly. Neither the bankrupts nor any other interested party saw fit to challenge the judgment by appeal or otherwise. It therefore became final and conclusive, and is not subject to collateral attack, as attempted in this case.

It follows that neither the demurrer to the indictment nor the objection to the introduction of the creditors' petition were well taken, and that the trial court did not err in overruling them.

Do the words "false oath," as employed in section 29 of the act, comprehend false swearing by the bankrupt in a proceeding before the court to investigate the truth of specifications filed against his discharge? The section, so far as it is necessary for our present inquiry, reads as follows:

"A person shall be punished by imprisonment for a period not to exceed two years upon the conviction of the offense of having knowingly and fraudulently * * * (2) made a false oath or account in or in relation to any proceeding in bankruptcy."

Section 2, subd. 12, of the act devolves the duty "to discharge or refuse to discharge bankrupts" upon courts of bankruptcy as one of the "bankruptcy proceedings" of which original jurisdiction was conferred upon them. Section 30 of the act authorizes the Supreme Court of the United States to prescribe "all necessary rules, forms and orders as to procedure and for carrying this act into force and effect." Pursuant to the provisions of that section, general order No. 12 was adopted by the Supreme Court, which is as follows:

"Applications for a discharge * * * shall be heard and decided by the judge, but he may refer such an application or any specified issue arising thereon to the referee to ascertain and report the facts."

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Upon the filing of the petition for discharge and the specifications of objection thereto, the court of bankruptcy, acting by authority of the general order just referred to, ordered:

"That said matter [the specifications of objection] be, and the same is hereby, referred to Michael Doran, Jr., one of the referees in bankruptcy of said court, to take the evidence of the parties in interest with respect to the material matters set forth in said specifications, which are attached to this order, and report such evidence to the court, together with written findings thereon and recommendations as to whether discharge should be granted or refused said bankrupts."

By that order the referee was required to take the evidence of the parties in interest. That necessarily included the bankrupt, Edelstein, for no one had a greater interest in the pending inquiry than he.

From the foregoing, it appears that the examination of the bankrupt, Edelstein, was authorized by law, and appropriate orders of court made pursuant thereto. Obedient to the order of court, the bankrupt appeared before the referee, was sworn by him, as authorized by section 20, to tell the truth, and gave testimony on his own behalf on the pending issue. In giving that testimony it is charged that he made a false oath, or swore falsely, within the meaning of section 29, supra.

It is contended by defendant's counsel that section 7, subd. 9, which requires a bankrupt when present at the first meeting of his creditors, and at such other times as the court shall order, "to submit to an examination," etc., does not necessarily contemplate that the examination should be under oath. We think this is a misconception of the provisions of the act. The word "examination," used in connection with legal proceedings, is commonly understood to mean an examination under oath or "affirmation," which by the provisions of the bankruptcy act (section 1, subd. 17) is included in the word "oath." In view of this common understanding, it is not conceivable that Congress intended a departure from it without clear and unambiguous words to that effect. There are no investigations in which prospect of the pains and penalties of perjury can be more salutary than one into the affairs of an insolvent debtor, and we cannot strain or distort the ordinary meaning of language to indulge the presumption that Congress intended to do away with that safeguard. This interpretation of the legislative intent is reinforced by the context, in which the provision for an "examination" is found. With direct reference to that provision it is said: "But no testimony given by him shall be offered in evidence," etc. The word "testimony" or "to testify" implies the usual preliminary qualification of taking an oath to speak the truth. Such an implication is so reasonable and well understood among lawyers and legislators that we would do violence to common intelligence to impute to Congress any other intention in the legislation in question.

It is further contended by counsel for defendant that the words "false oath" as so employed relate to the oath required by section 7 to be made by the bankrupt to his schedules of assets and liabilities, and do not relate to false swearing by the bankrupt in an examination to which he may be subjected. This contention does not commend itself to our approval. The offense is denounced broadly. It consists of making "a false oath or account in or in relation to any pro-

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ceeding in bankruptcy." This, according to the plain and usual meaning of the language employed, embraces not only the making of false accounts, but the making of false oaths in or in relation to a proceeding in bankruptcy. Adverting again to section 2 of the act, it is observed that the granting or refusing to discharge a bankrupt is one of the recognized bankruptcy proceedings of which original jurisdiction is conferred upon courts of bankruptcy. The two sections, considered together, do not conduce to the result claimed by defendant's counsel. A most helpful rule governing the interpretation of legislative enactments is to examine all its provisions, and construe each in the light of all the others, to the end that they may be given one harmonious operation. In this way we most surely arrive at the legislative intent. If the false oath in question does not embrace false swearing in testimony given by bankrupts in the proceeding relating to their discharge, which is one of the primary purposes of the act, it is difficult to understand what proceedings in bankruptcy could be referred to in section 29, in which false swearing is denounced as a crime. We think the obvious meaning of the provision is as stated by Loveland in his second edition of the Law and Proceedings in Bankruptcy (section 231) as follows:

"An offense under this provision may arise in connection with any oath or affirmation made in any part of the proceedings; as an oath to a schedule filed by a bankrupt, an oath to prove a debt by a creditor, an oath made to an account by a trustee, or a deposition or testimony given by any person in the course of the proceedings."

This construction is a broad and wholesome one, fairly within the intendment of the language employed, and conducing to the effectual enforcement of all the provisions of the act; while any other, and especially that claimed by defendant's counsel, leaves the act unenforceable, except by the imperfect obligation of moral suasion, as against attempts of the bankrupt, which are too often made to thwart its main purpose of distributing all his assets among his creditors. This court in Bauman v. Feist, 46 C. C. A. 157, 107 Fed. 83, speaking by Judge Caldwell in a case involving the question whether a false oath would bar a discharge of the bankrupt, made use of the following language:

"The 29th section declares that the bankrupt shall be punished by imprisonment upon the conviction of the offense of having knowingly or fraudulently made a false oath or account in or in relation to any proceeding in bankruptcy. Plainly the false oath contemplated by this provision must be one material to the proceedings in bankruptcy. It must have some relation to the bankrupt's estate or to the bankrupt's act affecting his estate, and must have been made knowingly and fraudulently."

Our present view is in full accord with the view then entertained by this court, and, notwithstanding the fact we were then considering the section in question in relation to other provisions of the act, the interpretation placed upon it is equally appropriate in its relation to the provisions now under consideration.

Does the immunity provision found in section 7, subd. 9, prevent the use of defendant's testimony as the basis of an indictment in this case? The context in which this provision is found is as follows:

"Any person at the first meeting of his creditors and at such other times as the court shall order [the bankrupt shall] * * * submit to an examina-

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**tion concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and in addition, all the matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding."**

This provision finds its inspiration in the fifth amendment to the national Constitution, which ordains that "no person shall be compelled in any criminal case to be a witness against himself." That constitutional inhibition was intended for the protection of personal rights, and a liberal construction should be placed upon it to accomplish the intended purpose. It has been held efficacious to prohibit coercion by statute of self-incriminating testimony, not only in a pending criminal case, but in investigations by grand juries and legislative committees. Statutory requirements for production of books, or making returns by individuals or officers of corporations, concerning their method of doing business, have been held invalid on a claim that they might tend to incriminate. The inhibition not only protects one from the disclosure of facts which would tend to prove his guilt, but also from disclosure of facts which might furnish a clue or a link in a chain of evidence by which a criminal offense might be made known. Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110; Emery's Case, 107 Mass. 172, 9 Am. Rep. 22; State ex rel. Attorney General v. Simmons Hardware Co., 109 Mo. 118, 18 S. W. 1125, 15 L. R. A. 676.

In view of the foregoing authorities, the immunity found in section 7, subd. 9, not being an absolute one from future prosecution for the offense to which the testimony related, but a partial one from the use of the testimony given in such a prosecution, was not sufficient to supplant the privilege conferred by the Constitution in the event such privilege had been claimed by the bankrupt. Counselman v. Hitchcock, supra. The defendant, however, did not claim his constitutional privilege, but consented to answer the obviously self-incriminating question propounded to him on the terms of the partial immunity afforded by the bankruptcy act, namely, that his testimony should not be used against him in any criminal proceeding. He contends that this is a "criminal proceeding," and that he comes literally within the protection of the last-mentioned immunity clause. The government contends that the immunity has sole reference to the use of evidence in a prosecution for some offense to which his evidence related; that Congress offered as an inducement to a full, frank, and truthful disclosure by a bankrupt for the benefit of his creditors of all matters and things concerning his property and estate that his evidence should not be used against him in any prosecution for any such offense, however much it might implicate him.

Defendant's argument is that the language employed is comprehensive and unequivocal; "that no testimony given by him shall be offered against him in any criminal proceeding"; that it, in terms, prohibits the use of the negative answer given by the bankrupt to the question propounded to him, although knowingly and intentionally false, as a basis for the criminal charge involved in the indictment

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now under consideration. To this we cannot give our assent. There is no rule requiring a literal construction to be placed even upon unambiguous words of a particular clause of a statute without consideration of its context. The meaning of specific words in one part of a statute is often controlled by other provisions of the same act, and frequently by provisions of other acts which are in pari materia.

Sutherland, in his work on Statutory Construction (section 219), says:

"Not only may the meaning of words be restricted by the subject-matter of an act or to avoid repugnance with other parts, but for like reasons they may be expanded. * * * The statute itself furnishes the best means of its own exposition; and if the intent of the act can be clearly ascertained from a reading of its provisions, and all its parts may be brought into harmony therewith, that intent will prevail without resorting to other aids for construction. * * * The intention of an act will prevail over the literal sense of its terms."

These are different ways of expressing the well-recognized rule for construing a statute, namely, to ascertain from all its provisions, reasonably and naturally construed, what was the legislative intent. Applying this rule to the present case, we observe that the provision for the immunity is found in a section of the act providing for the examination of a bankrupt, concerning the conduct of his business, his dealings with his creditors and other persons, and the amount, kind, and whereabouts of his property. Section 7, subd. 9. The examination there contemplated relates to past transactions. Such examination might, from the nature of the case, in view of the penal provisions of the act, disclose evidence of former criminal conduct on the part of the bankrupt. Such evidence, however, was deemed so important and necessary for the proper administration of the estates of bankrupts that Congress, in effect, in the concluding portion of subdivision 9, makes a proposition to the bankrupt that, if he would forego his constitutional privilege to refuse to testify about his past transactions in so far as they might tend to incriminate him, no testimony which he might give should be used against him "in any criminal proceedings." What criminal proceeding do these words relate to? Obviously, to such as might arise out of the conduct of his business, the disposition of his property, and other past transactions, about which alone the statute authorized the examination in question to be made. The immunity was made conditional upon his giving testimony upon subjects out of which prosecutions against him might flow. A most natural and reasonable inference, therefore, is that Congress intended the immunity to relate to the use of his evidence in such criminal prosecutions only.

The Supreme Court in the Counselman Case, on page 586 of 142 U. S., page 206 of 12 Sup. Ct. (35 L. Ed. 1110), said:

"In view of the constitutional provision [fifth amendment] a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates."

It would seem that the statute in question was not intended to confer a broader immunity, so far as it was applicable, than the constitutional provision does in its scope of operation. To hold that the statute pro-

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tects a bankrupt from the use of his evidence in a prosecution for perjury while actually testifying would defeat the obvious purposes of the act. It would, in effect, say to the bankrupt: You may forego the exercise of your constitutional privilege, and consent to testify concerning the conduct of your business, and in that way promote the efficient administration of your estate and benefit your creditors, and by so doing secure the immunity provided for; but if you give false testimony, calculated to embarrass the administration of your estate and to defeat the just rights of your creditors, and thereby commit a crime specially denounced against you, you shall enjoy the same immunity therefor. Moreover, it would, in effect, secure to the bankrupt the immunity in question for violating his part of the compact, namely, to testify—that is, to testify truthfully—by virtue of which he secured a right to the immunity. We are not willing to impute to Congress any such contradictory and absurd purpose. The words "any criminal proceeding" cannot sensibly or reasonably be construed so literally and generally as to include the criminal proceeding provided by law for false swearing in giving his testimony. They obviously have reference to such criminal proceedings as arise out of past transactions, about which the bankrupt is called to testify. "Constructions of statutes are to be made of the whole acts, according to the intent of the makers, and so sometimes are to be expounded against the letter to preserve the intent. * * * The reason and object of the statute are a clue to its true meaning." Taylor v. Taylor, 10 Minn. 107 (Gil. 81), and cases cited. "Theoretically, this argument" for construing statutes according to the literal meaning of the words employed "would seem to furnish a safe rule of interpretation. Practically, it is not always safe or sensible. A rigid adherence to it would not infrequently involve us in contradictions, absurdities, and palpable violations of the real intention of the Legislature." Ryegate v. Wardsboro, 30 Vt. 746, 749. "The intent and spirit of the act, and not the literal meaning, must govern where absurd consequences would otherwise follow." Reynolds v. Holland, 35 Ark. 56, 61. "If the intention" of the Legislature "is expressed in a manner devoid of contradiction and ambiguity, there is no reason for interpretation or construction * * *," and the literal meaning of the words of the statute must be enforced; but in cases involving such contradiction and ambiguity, courts are at liberty to decide in contravention of the exact language of the statute, if it is necessary to do so to enforce the legislative will. Sedgwick on the Construction of Stat. & Const. Law (2d Ed.) pp. 253–255.

In view of the mischief to be remedied and the object to be accomplished by the statute in question, we are unable, in the light of reason or authority, to sustain defendant's contention that it affords immunity to him for the crime with which he is charged in this case. The authorities to which his counsel invited attention (United States v. Simon [D. C.] 146 Fed. 89, among others) have been carefully considered, but are not sufficiently persuasive to overcome our settled conviction. Finding no error in the proceedings below, the judgment is affirmed.

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PHILIPS, District Judge (dissenting). On mature consideration, I find myself unable to concur in so much of the foregoing opinion as holds that the testimony containing the alleged false answer to the question propounded to the bankrupt, the defendant below, does not come under the protection of the immunity clause to section 7 of the bankrupt act. By the first clause of said section, the bankrupt is required to attend the first meeting of creditors, "if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed." The bankrupt did attend and testify at the hearing of his application for final discharge in response to the subpœna from the referee, which was equivalent to the order of the court. The second, third, fourth, fifth, sixth, and seventh clauses of the section pertain merely to acts to be done by the bankrupt in aid of the administration of the estate, which do not involve the making of an oath by him. The eighth clause imposes upon him the duty of preparing under oath a schedule of his property and a list of his creditors. As this is not "testimony," but is an oath per se, it comes clearly within the purview of section 29b (2) of the bankrupt act, on which an indictment may be predicated. Then follows subsection 9 of section 7, which declares that:

"When present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conduct of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding."

The bankrupt submitted himself on such order "to an examination concerning the conduct of his business, * * * his dealings with other persons, * * * and the whereabouts of his property." It was in respect of his dealings with certain goods coming into his possession, claimed to belong to the estate, about which he was interrogated, and is alleged to have answered falsely. Immediately in this connection occurs the immunity provision that "no testimony given by him shall be offered in evidence against him in any criminal proceeding." Among the objects of such examination of the bankrupt, either at the first meeting of his creditors or at the hearing of his application for final discharge, is the conservation of the interests of the estate in the matter of discovering assets and obtaining other information, as "matters which may affect the administration and settlement of his estate." To induce him to make answer and to waive his right to stand mute where any fact elicited from him might subject him to criminal prosecution, this proviso was evidently added. He had made oath to his schedules, purporting to cover and account for all his property. Concededly, no testimony he might give on such examination could be employed against him on a criminal prosecution for having made a false oath to such schedule. But it is asserted that such immunity of section 7 extends only to the offering of any testimony he may give on such examination against him where he is indicted for making a false oath in some other matter pertaining to the proceedings in bankruptcy, and that the purpose of Congress was to induce



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him to tell the truth, and not a falsehood, about the matter inquired about. It ought to be sufficient, it seems to me, to say that this proviso does not so state. Its language cannot be extended by implication where it is sought to deprive the citizen of his liberty. In plain and unambiguous language the statute says to the bankrupt, when he submits to the examination by the court, that "no testimony given by you on this hearing shall be offered against you in any criminal proceeding, and therefore you need not stand on your right to remain mute, but you may testify as you may, with full impunity." No case could be made out against him under an indictment for perjury without offering in evidence his testimony given in the examination. It would be little less than a fraud upon him to induce him to take the witness stand and testify under statutory language so broad, and then hold that the immunity was intended by Congress to apply only to the instance where he may be indicted for having sworn falsely in some other matter. If Congress so intended, it should have said so, which it could have expressed by the addition of a few words. This is what Congress did in the act of February 25, 1868 (chapter 13, § 1, 15 Stat. 37, now section 860, Rev. St. [U. S. Comp. St. 1901, p. 661]), where it declared that no discovery or evidence obtained from a party or witness by means of a judicial proceeding "* * * shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States in any criminal proceeding." But in order to place the limitation upon the immunity asserted in the majority opinion, Congress inserted the following proviso: "That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid." So in the act of February 11, 1893, (chapter 83, 27 Stat. 443, 444 [U. S. Comp. St. 1901, p. 3173]), relating to the testimony in investigations, etc., under the interstate commerce law, after requiring persons to appear and produce books and testify, under the assurance of exemption from prosecution for anything concerning which the party might testify, Congress added the proviso: "That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying." From which it appears that in the understanding of Congress, the broad terms of said statutes exempting the party testifying from prosecution, it would embrace a prosecution for perjury predicated on his testimony so given. Therefore, it added the proviso that he would not be exempt, however, from prosecution and punishment for perjury committed in so testifying. The omission of this proviso from subsection 9 of section 7 of the bankrupt act is most significant. Congress was legislating respecting proceedings under the bankrupt act, and it made all the provisions deemed by it advisable. Evidently enough, it did not conceive that said section 860 of the General Statutes was applicable.

The objection interposed by the defendant below to the admission of his testimony given before the referee in bankruptcy, in my judgment, should have been sustained, and the defendant discharged.

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(149 Fed. 647.)

## KREIDER et al. v. COLE.

(Circuit Court of Appeals, Third Circuit. January 11, 1907.)

No. 13.

1. COURTS—FEDERAL COURTS—JURISDICTION—DETERMINATION OF QUESTION.
In a suit in the federal courts, a question of jurisdiction is fundamental, and may be raised at any time, in any mode, and at every step in the proceedings, either by the court of its own motion or by the parties, and such investigation may be instituted as shall be necessary to establish or defeat the court's jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 818.]

2. SAME—CAUSE OF ACTION—TRANSFER.
Act Cong. March 3, 1875, c. 137, § 5, 18 Stat. 472 [U. S. Comp. St. 1901, p. 511], provides that if a suit brought in or removed to a Circuit Court of the United States does not involve a controversy properly within its jurisdiction, or if the parties have been improperly joined to create a case cognizable or removable under the act, the court shall dismiss the suit or remand it, as justice may require. *Held* that, where persons largely interested in a Pennsylvania corporation, desiring to institute a suit in the federal courts of Pennsylvania for a receiver, caused certain bonds and stock of little or no value to be assigned to a citizen of New Jersey, who was a mere stenographer in the office of one of the corporation's attorneys, for no other consideration than that he should sign the bill, which the corporation's attorneys thereafter filed, such transaction constituted a fraud on the court's jurisdiction sufficient to defeat it, though the assignment was absolute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 862.]

Buffington, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 140 Fed. 944.

T. R. White, for appellants.

Francis S. Brown and Ira Jewell Williams, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from the decree of the Circuit Court for the Eastern District of Pennsylvania, denying the prayer of the appellants, as interveners, in a certain suit in equity, wherein Stirling W. Cole was complainant and the Philadelphia & Easton Street Railway Company was defendant, that the said bill in said suit be dismissed for want of jurisdiction, and the appointment of receivers therein vacated. The bill in the original suit was filed by Stirling W. Cole, as complainant, September 23, 1905. On the same day, an appearance having been entered by the Philadelphia & Easton Railway Company, the defendant, an appointment was made, by consent of its counsel, of the Excelsior Trust & Saving Fund Company as temporary receiver. On October 4, 1905, an answer was filed by said company, admitting the facts set forth in the bill, and submitting itself to the order of the court in the premises.

On the same day a petition was filed by the appellants, as receivers of H. M. Herbert & Co., who, it was alleged, had been creditors of the said defendant company, praying that they be allowed to inter-

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vene. The petition set out an indebtedness of the said railway company to H. M. Herbert & Co., to a large amount, and alleged that the appointment of a receiver, on account of insolvency alone, was improper and unauthorized; that the bill had been filed by the procurement and direction of certain directors of the company, in whose interest the receiver, beforehand agreed upon by said directors, had been appointed. It also states that the interveners, at about the time of the filing of the complainant's bill in the court below, had filed a bill in the common pleas court of the state of Pennsylvania, in and for Bucks county, charging improper conduct on the part of the board of directors of the defendant corporation, and praying for divers relief and also for the appointment of a receiver or receivers of the said railway company and its property. A copy of the said bill is annexed to the petition. From it, it appears that the same was filed on Monday, September 25th, the bill of complainant in the court below having been filed on Saturday, September 23d. The petition avers that the said bill in the state court was duly served upon said company, and service thereof accepted by counsel for said company, in open court, where, at the same time a motion was made for the appointment of a receiver, to be heard on October 2d; that the bill in equity in this cause was filed in the court below, accompanied by an acceptance of service by an attorney who is in the office of the counsel who appeared for the plaintiff, and on the day of its filing, a receiver was appointed, with the consent of said counsel, as above stated. The petition also avers that the bill was filed collusively, in that the—

"Petitioners are informed and upon information believe and aver that the plaintiff in this cause is a stenographer in the office of the prosecutor of the pleas in the city of Camden, state of New Jersey. He claims to own one bond of the issue of July 2, 1901, and one of the issue of November 12, 1904, being bond No. 745, which H. M. Herbert & Co. sold in July, 1904, to A. C. Patterson, president of the Excelsior Trust & Saving Fund Company, and certain shares of capital stock. Your petitioners believe and aver that the said plaintiff holds these securities merely colorably, for the purpose of giving an apparent jurisdiction of the case to this honorable court."

The petition therefore prayed that the bill be dismissed, and the appointment of the temporary receiver be vacated.

On October 14, 1905, the petition of Amos Johnson, who averred that he was a citizen of the state of New Jersey, and asked for leave to intervene as a creditor and stockholder of the defendant company, was filed; and on October 16, 1905, the petition of John I. Beggs, who averred that he was a citizen of the state of Wisconsin, and, as trustee in bankruptcy, a creditor of the said defendant company, was filed, asking leave to intervene as party plaintiff, both petitions asking leave to join in the allegations and prayers of the bill. On December 5, 1905, a decree was entered, appointing receivers and granting the prayer of both of the said petitioners. On October 5, 1905, a rule was granted to the appellants, to take depositions in the matter of the want of jurisdiction, alleged in their said petition. After the taking of the testimony, to wit, on October 25, 1905, an answer by Stirling W. Cole, the appellee, was filed to the petition of the appellants, denying and controverting the allegations of their petition, and

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asking that the same should be dismissed. On November 6, 1905, the court below filed an opinion on the issues joined between the defendant and the appellants, as interveners, refusing to dismiss the bill of the complainant-appellee, and confirming the appointment of the temporary receiver.

The learned judge, after considering the evidence, taken on the rule granted the petitioners for that purpose, sustained the jurisdiction of the court below, saying in his opinion:

"The evidence shows that the bonds and stock were transferred to the plaintiff, who is a non-resident of this district, for the purpose of filng this bill. It also shows that he is the absolute owner, as there is no agreement that he shall collect for the transferrors, or that they have the least interest in the securities. This being the case, there is no question but what this court has jurisdiction. Of course, where property has been colorably and collusively transferred to a non-resident for the sole purpose of giving the federal courts jurisdiction, and where the nominal parties are not the real parties and the real owners of the property in dispute, the federal courts will dismiss the case when that fact is made to appear, but the court will not inquire into the intention or motive of the parties when it is established that the nominal parties are the real parties, even though there be no consideration for the property transferred, so long as they are the real bona fide owners and are not merely holding it for the sole and only purpose of enabling them to bring suit in the United States courts."

He then quotes the language of Justice Harlan, in the case of Lehigh Mining & Mfg. Co. v. Kelly, 160 U. S. 336, 16 Sup. Ct. 311 (40 L. Ed. 444), and thus concludes:

"In this case, it is established that the grantor or vendor of the stock and bonds has not reserved, nor does he claim a right or power to compel or require a reconveyance or return to him of the property, and we think this court has jurisdiction."

The specifications of error in the decree appealed from, challenge the correctness of this conclusion of the court below, upon the evidence disclosed in the record.

A question of jurisdiction is fundamental and underlies all other questions arising in the course of a litigation. Such a question may be raised at any time, in any mode, and at any stage, as every step taken in the progress of a cause is an assertion of jurisdiction, and the court may, of its own motion, make the objection or institute such investigation as may be necessary to establish or defeat it. This is especially true of the federal courts, as being courts of limited or statutory jurisdiction. The reasons for extending judicial power of the United States to controversies between citizens of different states, are historical and need not be now rehearsed. It suffices to say that the federal courts have, from the beginning, jealously guarded against all attempts to found jurisdiction upon controversies that were not really and substantially such between citizens of different states. Butler v. Farnsworth, 4 Wash. C. C. 101, Fed. Cas. No. 2,240.

The facts upon which the jurisdiction in the present case is challenged were established by the testimony of Stirling W. Cole, the complainant therein, upon whose testimony alone the appellant relies. We have accordingly carefully examined this testimony, the important parts of which we quote from the record, as follows:

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"By Mr. Page: Q. Where do you reside? A. No. 116 North Sixth street, Camden, N. J. Q. What is your business? A. Stenographer. Q. To whom? A. Frank T. Lloyd, prosecutor of the pleas, Camden, N. J. Q. How long have you resided in Camden, and how long have you been employed by Mr. Lloyd? A. I have resided there about three and one-half years, and have always been employed by him ever since I came to Camden. Q. How old are you now? A. Twenty-two last March. Q. There has been a bill in equity filed here, copy of which I hand you. Was this filed on your behalf? A. Yes, sir. Q. By your direction? A. Yes, sir. Q. Did you take the affidavit which is at the back of it? A. I did; yes, sir. Q. Did you take it on the 23d of June, 1905? A. No. Q. When did you take it? A. To-day. I took it originally, to one like this, about two or three weeks ago; I won't be sure of the date. Q. See if you can recall the date you took that oath. A. I don't even remember the day of the week. Q. In what week was it? A. I should say, just thinking back, in the neighborhood of two or three weeks ago. Q. Say three weeks ago, where would that bring you? A. That would bring it back in the neighborhood of the 18th or 20th, but I am absolutely unable to say accurately. Q. Perhaps you might fix it by the events surrounding it. Where was the affidavit taken? A. There was one affidavit taken in Mr. Lloyd's office, and one was taken in Mr. Williams' office. Q. Were they both taken the same day? A. The two were taken on the same day. Q. When you say there were two, what do you mean; was one like this to the bill, or was it to an affidavit or what? A. One was an affidavit to the whole bill; was in the form of an affidavit to which I swore, and then there was a small affidavit to which I also swore. Q. Did you swear to a bill at that time? A. I did. Q. Then did you take two oaths or three oaths? A. I took two oaths on that day. Q. One was at Mr. Lloyd's office and one at Simpson & Brown's office? A. That is right. (Witness shown paper.) Q. Is that the affidavit you swore to? A. That is apparently a carbon copy of the affidavit. Q. You swore to that? A. Yes. Q. Was this done in Mr. Lloyd's office? A. No; in Mr. Williams' office. Q. The bill then was sworn to in Mr. Lloyd's office? A. A small affidavit on a page at the back of the bill was sworn to at Mr. Lloyd's office. Q. Was the bill attached to it? A. Yes, sir; if I remember correctly. Q. What time in the day, in Mr. Lloyd's office, did you swear to the affidavit? A. In the morning. Q. At what time did you swear to the bill? A. In Mr. Williams' office; it was in the forenoon, or very nearly 12 o'clock, probably a little after 12. I think I left Camden about 12. Q. Having previously sworn to the affidavit in Camden? A. Yes, sir. Q. In both the bill and affidavit it is asserted that you own two bonds of the Philadelphia & Easton Railway Company? A. Yes, sir. Q. And 100 shares of stock? A. Yes, sir. Q. Will you be good enough to tell me when you obtained possession of this stock and these bonds? A. I obtained possession of one bond at the time I swore to the two first affidavits, and the stock and the remaining bond to-day, but they were taken charge of by Mr. Williams for me on the day on which I made the original affidavit. Mr. Williams held them for me as my counsel. Q. Did you ever have possession of these securities prior to the time which you have now stated? A. What do you mean by the time now stated? Q. You state one of these bonds was placed by you with Mr. Williams as your counsel at the time you signed the bill, and you said you got the other securities to-day. A. Actual and physical possession of them, but at the time I signed the original affidavit, it was understood they belonged to me, but they were left in Mr. Williams' possession. Q. When you say it was understood, do you mean to say you understood, or who understood? A. I understood. Q. Before that bill was filed and Mr. Williams received charge of one of these bonds for you, had you paid a single penny for that bond? A. I had not. Q. Had you paid a single penny for the other bond or the stock? A. No. Q. When was it that you first paid for these bonds and this stock? A. There was no actual money paid. Q. From whom did you obtain them? A. From Mr. Williams. Q. Mr. Ira Jewell Williams? A. Yes, sir. Q. One of these bonds, you say, was of the old issue, No. 745, and the bond of the new issue was No. 841. Which bond did you get when you first signed the bill? A. I do not recall. I did not take notice of the numbers at that time. Q. Was it a bond of the old issue or the new issue, the issue of 1901 or 1904? A. I am unable to state that either. Q. Did you have the stock in your hands at all, the certificate of stock? A. Yes, sir.

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Q. In whose name was the certificate made out? A. In the name of one Rosenberger, I believe. Q. You do not know him, do you? A. I don't know him personally. Q. You did not buy it from him? A. No. Q. You made no bargain to buy it from him? A. I did not. Q. In fact you did not have anything to do with getting it from him? A. Not from Mr. Rosenberger; no, sir. Q. Has the stock ever been transferred to you? A. I believe it is transferred in blank from Mr. Rosenberger in blank. Q. You mean indorsed on the back? A. Yes, sir. Q. That is, the power of attorney on the back is indorsed in blank? A. Yes. Q. Your name as a stockholder does not appear on the certificate? A. No, sir. Q. And so far as you know, your name does not appear in the stock book and you have never requested that it should be put in your name? A. I have never requested that it be transferred. Q. Did you or did you not direct or request Mr. Williams or anybody else to purchase these bonds and this stock for you? A. I did not directly request it; no, sir. Q. As you only received that bond, one of the two bonds you speak of in your bill, and left it in the hands of Mr. Williams, never having seen it before, that being the day you signed the bill, would you be good enough to tell me why you filed a bill against the Philadelphia & Easton Railway Company, not being up to that time interested in the company at all? (Objected to by Mr. Williams.) A. I filed the bill in consideration of the bonds being transferred to me; they were to be transferred to me in consideration of the filing of the bill. Q. Is that true of the stock also? A. Yes, sir. Q. So that, if I understand you, the sole consideration that you gave for these securities was the filing of this bill? A. Yes, sir. Q. Was it after your work on Saturday that you came over to Mr. Williams' office to do this thing? A. I think it was on Friday; I don't think it was a Saturday. Upon looking again, I should say it was September 22d. Q. But are you not yet positive? A. I am not exactly positive, but I am pretty sure it was on a Friday. Q. After you came over, did you direct the bill to be filed? A. I did not say in so many words to file the bill, but the bill speaks for itself in that respect, I should think. Q. Would you be good enough to tell me with whom you made this arrangement, whereby the consideration of your action was the receipt of these securities? A. With Mr. Williams. Q. May I ask you when you entered into that arrangement? How long before you came to his office? A. At his office. Q. Was it at that time or some time prior to the time when you swore to the bill? A. At the time I swore to the bill. Q. Who brought you the affidavit to Mr. Lloyd's office, which you took? A. It came by mail. Q. Was there a request in that that you should take affidavit to that bill? (Objected to by Mr. Williams.) A. I think there was. Q. And that was the first time your attention was drawn to the consideration of the question? A. That was the first time it was directly drawn to the question. Q. You have had no correspondence or arrangement with regard to your action until the affidavit was presented to you at Mr. Lloyd's? A. None. * * * Q. Mr. Cole, having entered into this arrangement, as suggested by Mr. Williams in his letter, and having come over to the office to sign the bill and swear to it, what arrangement did you make, if any, with regard to the costs, expenses, etc.? A. I made no arrangements whatever. Q. Did you or did you not expect to pay for the costs of this litigation? (Objected to by Mr. Williams.) A. No, I did not."

Upon cross-examination, Mr. Cole states that, when he swore to the bill in Mr. Williams' office, one of the counsel for the defendant corporation, a certain Mr. Lugar, whom he had never met, but who, he was told, was secretary and general manager of the defendant corporation, informed him as to the general condition of the road, and upon that information he swore to the averments of the bill. From this, it is apparent that the bill was filed at the instance of the corporation itself, or at least of some of its managers, Mr. Cole's appearance as plaintiff having been procured by its general counsel, who filed the bill in his name.

Apart from the requirements of the statute presently referred to, we think these facts, testified to by the plaintiff himself, would have fully

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justified the court below in dismissing the bill, on the ground that it had been made to appear by the plaintiff's own statement, that there was no real controversy between him and the defendant corporation, that his interest was a nominal one, and that the real interest was in those who controlled the corporation defendant and were in large part its stockholders and creditors. The results of granting the prayers of the bill and the appointment of the receivers would be substantially, if not altogether, for the benefit of these controlling creditors and stockholders, and infinitesimally, if at all, for the benefit of the nominal plaintiff. The real interest was in, and the real controversy was between, citizens of the state of Pennsylvania, and neither the Constitution nor the judiciary law framed in pursuance thereof, can or should be so construed as to permit such controversies to be justiciable in the federal courts, or the limitations upon their jurisdiction to be evaded by artifices so transparent as those disclosed in the testimony above recited. That such jurisdiction cannot be created by such devices, had been decided by the Supreme Court long prior to the enactment of the statute of March 3, 1875. The mandatory provisions of section 5 of that act (Act March 3, 1875, c. 137, 18 Stat. 472 [U. S. Comp. St. 1901, p. 511]), set at rest any doubts that may have been entertained, as to how far courts might go in putting a stop to all "collusive shifts and contrivances for giving such jurisdiction." The act is entitled "An act to determine the jurisdiction of Circuit Courts of the United States," etc., and the fifth section reads, in part, as follows:

"That if, in any suit commenced in a Circuit Court, or removed from a state court to a Circuit Court of the United States, it shall appear to the satisfaction of the said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require."

It is hard to conceive how any case would more certainly be within the meaning of this language than the one at bar. It is apparent from the testimony which we have quoted, that not only was there no real and substantial controversy between the plaintiff, Stirling W. Cole, and the defendant corporation, but that the complainant was made a party to the suit collusively, and by the direct procurement of those interested in the defendant corporation. Counsel for complainant frankly avow that the bonds and stock were transferred to Cole for the purpose of creating a jurisdiction on the ground of diverse citizenship, and were so transferred in consideration of his signing the bill for that purpose. They contend, however, that the transfer of these two bonds and the shares of stock was absolute on its face, leaving no interest therein in the grantors, and accompanied by no trust in their favor, and they cite the cases of Lehigh Mining & Mfg. Co. v. Kelly, supra, and South Dakota v. North Carolina, 192 U. S. 286, 24 Sup. Ct. 291, 48 L. Ed. 437, as authority for the proposition that, no matter for what motive such a transfer may be made, if ab-

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solute on its face it cannot be challenged as insufficient to give jurisdiction. We do not think, however, that these cases support this proposition to the extent necessary to sustain jurisdiction on facts like those in the present case, or that either of them support a doctrine different from that stated by the Supreme Court in Dickerman v. No. Trust Co., 176 U. S. 181, 20 Sup. Ct. 311, 44 L. Ed. 423, also cited by the appellee, as follows:

"It is well settled that a mere colorable conveyance of property, for the purpose of vesting title in a non-resident and enabling him to bring suit in a federal court, will not confer jurisdiction; but if the conveyance appear to be a real transaction, the court will not, in deciding upon the question of jurisdiction, inquire into the motives which actuated the parties in making the conveyance."

The case of the Lehigh Mining & Mfg. Co. v. Kelly, which seems to have been relied upon by the learned judge of the court below, was a case in which the tract of land in controversy was owned by the Virginia Coal & Iron Company, a corporation organized under the state of Virginia. In order to prosecute certain litigation against another citizen of Virginia, in reference to said land, the stockholders of the Virginia Coal & Iron Company organized the Lehigh Mining & Manufacturing Company, under the laws of the state of Pennsylvania; the land in controversy was then conveyed by the former company to the latter, thus vesting the title to the subject-matter of litigation in a citizen of Pennsylvania. Here was a complete and effective transfer of title, absolute on its face and leaving no interest whatever in the grantor, the old corporation. It is true that Judge Harlan used the language quoted in the opinion of the learned judge of the court below, to the effect that a citizen of one state, a bona fide purchaser of property, cannot be debarred of his privilege to maintain a suit in the Circuit Court of the United States against a citizen of another state, because of the "motive that induced his grantor to convey * * * provided such conveyance or such sale and delivery was a real transaction, without the grantor or vendor reserving or having a right or power to compel or require a reconveyance or return to him of the property in question." But this was a preliminary statement, evidently made to guard against its being thought that the court intended to sanction so extreme a proposition, as, that a bona fide purchaser of property, where the sale and delivery was a real transaction and not a collusive one, should be denounced as a fraud on the jurisdiction, simply because the motive for such transfer or conveyance was that the grantee might be able to bring a suit in a federal court. Certainly there is no such hard and fast rule, as would denounce every such case, irrespective of its circumstances. After thus guarding himself, however, Mr. Justice Harlan proceeds to the consideration of the case in hand, and in the course of his opinion says:

"The arrangement by which, without any valuable consideration, the stockholders of the Virginia corporation organized a Pennsylvania corporation and conveyed these lands to the new corporation for the express purpose—and no other purpose is stated or suggested—of creating a case for the federal court, must be regarded as a mere device to give jurisdiction to a Circuit Court of the United States and as being, in law, a fraud upon that court, as well as a

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wrong to the defendants. Such a device cannot receive our sanction. The court below properly declined to take cognizance of the case.

"This conclusion is a necessary result of the cases arising before the passage of the act of March 3, 1875, c. 137, 18 Stat. 470 [U. S. Comp. St. 1901, p. 508]. The fifth section of that act provides that if, in any suit commenced in a Circuit Court, it shall appear to the satisfaction of that court, at any time after such suit is brought, that it 'does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable * * * under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit.' This part of the act of 1875 was not superseded by the act of 1887, amended in 1888 (Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]). Its scope and effect were determined in Williams v. Nottawa, 104 U. S. 209, 211, 26 L. Ed. 719, and Morris v. Gilmer, 129 U. S. 315, 9 Sup. Ct. 289, 32 L. Ed. 690. In the first of those cases the court, referring to the act of 1875, said: 'In extending a long way the jurisdiction of the courts of the United States, Congress was specially careful to guard against the consequences of collusive transfers to make parties, and imposed the duty on the court, on its own motion, without waiting for the parties, to stop all further proceedings and dismiss the suit the moment anything of the kind appeared. This was for the protection of the court as well as parties against frauds upon its jurisdiction.'

"The organization of the Pennsylvania corporation and the conveyance to it by the Virginia corporation, for the sole purpose of creating a case cognizable by the Circuit Court of the United States is, in principle, somewhat like a removal from one state to another with a view only of invoking the jurisdiction of the federal court."

In Morris v. Gilmer, supra, it was decided that a removal from one state to another, for the purpose of enabling the person so moving to bring suit in the Circuit Court of the United States, was a fraud upon its jurisdiction, and the following language of Mr. Justice Washington, in Butler v. Farnsworth, supra, is quoted with approval:

"If the removal be for the purpose of committing a fraud upon the law, and to enable the party to avail himself of the jurisdiction of the federal courts, and that fact be made out by his acts, the court must pronounce that his removal was not with a bona fide intention of changing his domicile, however frequent and public his declarations to the contrary may have been."

Mr. Justice Harlan also cites with approval from the case of Farmington v. Pillsbury, 114 U. S. 138, 5 Sup. Ct. 807, 29 L. Ed. 114:

"It (the act of 1875) was intended to promote the ends of justice, and is equivalent to an express enactment by Congress that the Circuit Courts shall not have jurisdiction of suits which do not really and substantially involve a dispute or controversy of which they have cognizance, nor of suits in which the parties have been improperly or collusively made or joined for the purpose of creating a case cognizable under the act."

The facts in the case of South Dakota v. North Carolina, 192 U. S. 287, 24 Sup. Ct. 291, 48 L. Ed. 437, are such as to entirely distinguish it from the present case. These facts, briefly, are that certain persons were owners of the bonds of the state of North Carolina; that that state had for a long time defaulted. The holders of these bonds decided to donate a portion thereof to the state of South Dakota. The whole transaction, together with the purpose and motive thereof, are clearly set out in the letter of gift, addressed to the Treasurer of the state of South Dakota. It is as follows:

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"Hon. Charles H. Burke—Dear Sir: The undersigned, one of the members of the firm of Schafer Bros., has decided, after consultation with the other holders of the second-mortgage bonds issued by the state of North Carolina, to donate ten of these bonds to the state of South Dakota. The holders of these bonds have waited for some thirty years in the hope that the state of North Carolina would realize the justice of their claims for the payment of these bonds. The bonds are all now about due, besides, of course, the coupons, which amount to some one hundred and seventy per cent. of the face of the bond. The holders of these bonds have been advised that they cannot maintain a suit against the state of North Carolina on these bonds, but that such a suit can be maintained by a foreign state or by one of the United States. The owners of these bonds are mostly, if not entirely, persons who liberally give charity to the needy, the deserving and the unfortunate. These bonds can be used to great advantage by states or foreign governments; and the majority owners would prefer to use them in this way rather than take the trifle which is offered by the debtor. If your state should succeed in collecting these bonds, it would be the inclination of the owners of a majority of the total issue now outstanding to make additional donations to such governments as may be able to collect from the repudiating state, rather than accept the small pittance offered in settlement. The donors of these ten bonds would be pleased if the Legislature of South Dakota should apply the proceeds of these bonds to the State University or to some of its asylums or other charities.

"Very respectfully, Simon Schafer."

It also appears in the record of this case that the treasurer of the state of South Dakota was specially authorized, by an act of the Legislature, to receive donations or gifts of money, bonds or choses in action, which, or the proceeds of which, when collected, were to be "appropriated to the State University or to the public schools, or to state charities, as may hereafter be directed by law." And the Attorney General is specially directed to bring suit in the name of the state, in any court of competent jurisdiction, state or federal, to collect or reduce in possession any such bonds or choses in action. The existence of this state law in South Dakota doubtless suggested the gift of these bonds to the state. It is to be observed that, not only was the gift out and out, but the consideration therefor was a "good one," in the sense that it was for a charitable use. No suit could be brought by any private holders, and the purpose is therefore avowed of turning over all these bonds for the charitable purposes indicated in the South Dakota law, because the donors preferred they should be so devoted, rather than accept the trivial sum offered in compromise by the state of North Carolina. If the state succeeded in its litigation, it alone was benefited, the donors being, from their situation, excluded from all participation therein. The state was to use its own discretion as to the collection by suit, and was to bear the entire cost of all litigation resorted to. It was as if the owners of these bonds had said: "Take these bonds; we can never collect them, and if you can make anything out of them, you may have it for the charitable purposes designated by the laws of your state." It is hardly worth while to pursue further the manifest difference between the facts of this case and those of the case with which we are here concerned. In any suit to be brought by the state of South Dakota against the state of North Carolina, the controversy between the parties to said suit would be real and substantial, and the parties thereto would not be improperly or collusively made, within the meaning of the act of 1875.

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In Little v. Giles, 118 U. S. 596, 7 Sup. Ct. 32, 30 L. Ed. 269, the facts are somewhat complicated, but it is sufficient for our purpose to state that certain conveyances of land were made to Giles, bona fide and absolute on their face; that there was evidence to show that the purpose for which the conveyance was made was to enable Giles to invoke the jurisdiction of the federal court, on the ground of diverse citizenship. A bill in equity was filed in the state court against him, as well as others, to set aside conveyances prior to those to Giles himself. Giles procured a removal to the Circuit Court of the United States, on the ground of his diverse citizenship, and a motion to remand, made by the complainants on the ground that Giles was not a real party in interest, and that the transfer to him was collusive, was refused by the Circuit Court. In reversing this action of the Circuit Court, on appeal, Mr. Justice Bradley, delivering the opinion of the court, says:

"But we are also satisfied that the other ground is well taken—that the deed to Giles was collusively made for the mere purpose of giving jurisdiction to the courts of the United States; and that for this reason the case should have been remanded to the state court. We have examined the evidence on this subject with some care, and have come to that conclusion. Whether, under the former practice of the court, the deed to Giles, being binding between him and his grantors, Wheeler and Burr, would have been deemed sufficient to give jurisdiction to the Circuit Court, although made for the purpose of such jurisdiction, it is not necessary to inquire. We are satisfied that, by the act of 1875, Congress intended to introduce a rule that shall put a stop to all collusive shifts and contrivances for giving such jurisdiction. The language of the fifth section of that act is as follows:"

After quoting the section, Mr. Justice Bradley continues:

"Here the words 'really' and 'substantially,' and the expression 'improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable,' are very suggestive, and show that, by giving the Circuit Courts authority to dismiss or remand the cause at once, if these things are made to appear, it was the intent of Congress to prevent and put an end to all collusive arrangements made to give jurisdiction, where the parties really interested are citizens of the same state. Of course, where the interest of the nominal party is real, the fact that others are interested who are not necessary parties, and are not made parties, will not affect the jurisdiction of the Circuit Court; but when it is simulated and collusive, and created for the very purpose of giving jurisdiction, the courts should not hesitate to apply the wholesome provisions of the law."

The facts of the case before us, showing collusion for the purpose of obtaining jurisdiction, are much stronger than any of those cited or which we have examined, where jurisdiction was denied. The complainant, a young man 22 years of age and a stenographer in the office of certain attorneys in the city of Camden, N. J., just across the river from Philadelphia, is called upon to file a bill in equity in the Circuit Court of the United States for the Eastern District of Pennsylvania, against a street railway corporation of that state, and operated entirely within its territory, for the purpose of having a receiver thereof appointed. He testified that until the day on which the bill was filed, he knew nothing of the matter in controversy, but signed the bill merely at the request of counsel for the defendant corporation; that one of the bonds which it is asserted he owns, he re-

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ceived after signing the affidavit to the bill, and the other he testifies he never saw, but that it was retained for him by one of the counsel for the railway company. The value of these bonds does not appear from anything contained in the record, but presumably neither the bonds nor stock of an insolvent corporation could have been anything near their par value. He testifies that he paid nothing for the transfer, the only consideration being that he should sign the bill as complainant; that it was understood that he was to be at no expense and be responsible for no costs. It is perfectly apparent that his interest in the suit was infinitesimal, in comparison with that of the directors of the corporation and other creditors, who held securities amounting to many hundreds of thousands of dollars, and at whose instance he became a party to the suit. After the signing of the bill, complainant, with his single bond, worth a few hundred dollars at the most, and the other in the possession of one of the counsel for the defendant corporation, to be held, as he says, for him, and his worthless certificate of stock, returns to the city of Camden without further concern or interest in the litigation, which is left entirely to the management of those who have the substantial interest in the controversy, and to the attorneys of the defendant corporation. If the contention of counsel for appellees is correct, that wherever, in a case like this, the transfer of property, for the avowed purpose of creating jurisdiction, is absolute on its face, there is a hard and fast rule that the jurisdiction thus obtained is valid and indefeasible, the purpose of the act of 1875 is, in large measure, if not altogether, defeated, and the jurisdiction of controversies may be forced away from the state courts, contrary to the manifest intention of the federal Constitution, and the laws made pursuant thereto, by simply placing, by an apparently out and out transfer, a portion of the property about which the proposed litigation is concerned, so small in value as to be negligible, in the hands of the citizen of another state. That this cannot be so, we think is apparent from a mere reading of the act of 1875, as well as of the decisions of the Supreme Court prior to its passage.

Not only must it appear that the controversy between the parties to the suit is real and substantial, but that the parties have not been collusively made or joined for the purpose of creating a case cognizable under the judiciary laws of the United States. If the action of the parties in this case be not declared collusive, within the meaning of the act of 1875, its provisions in that regard "would," to use the language of Mr. Justice Harlan in the Lehigh Mining Case, supra, "become of no practical value, and the dockets of the Circuit Courts of the United States would be crowded with suits of which neither the framers of the Constitution nor Congress ever intended they should take cognizance."

Appellees further contend that, however this may be, jurisdiction exists in this case by reason of the interventions, respectively, of Johnson and Beggs, as creditors and bondholders, both being bona fide residents of other states than the state of Pennsylvania, and that their diverse citizenship with the defendant is sufficient to sustain jurisdiction, even though, for the reasons stated, there was no valid

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jurisdiction at the time of the filing of the bill. This proposition is manifestly unsound. Unless a valid jurisdiction has been asserted in the original suit, no intervention therein can be entertained. The right to intervene must be predicated primarily on the existence of a suit of which the court has jurisdiction. Where there is jurisdiction of a suit on the ground of diverse citizenship, intervention, if otherwise proper, may be allowed, even though the interveners be citizens of the same state as the defendant. In such cases, the jurisdiction is tested alone by the diverse citizenship existing at the time the bill was filed, "and it is to that point of time that the inquiry as to jurisdiction must necessarily be referred." Rouse v. Letcher, 156 U. S. 47, 15 Sup. Ct. 266, 39 L. Ed. 341.

The case, therefore, is remanded to the court below, with instructions to enter a decree dismissing the bill.

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(149 Fed. 658.)

## ILLINOIS CENT. R. CO. v. WARREN.

(Circuit Court of Appeals, Fifth Circuit. December 31, 1906.)

No. 1,533.

1. CARRIERS—PASSENGERS—ANNOUNCEMENT OF STATION—INVITATION TO ALIGHT.
   The announcement of the next station by a porter on a railway passenger train, though made on the near approach to the station, is not an invitation to a passenger to leave his seat and attempt to alight before the train actually stops.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1224.]

2. SAME—POSITION IN TRAIN—CONTRIBUTORY NEGLIGENCE.
   Plaintiff and his brother-in-law were riding on a railroad train, guarding a negro. On the announcement of the station where they intended to alight, plaintiff, for the purpose of resuming custody of the negro and of getting off quickly, left his seat in the smoking compartment while the train was in motion, and went forward through the colored compartment to the front door of the car, which he opened, and stood there waiting for the train to slow down, with his right foot on the door sill, his left foot on the platform, and his right hand on the door facing, from which position he was knocked or pushed by the train porter, so that he fell from the car while the train was in rapid motion, and was injured. *Held*, that plaintiff was guilty of contributory negligence in taking the position he did, and was not entitled to recover, in the absence of proof that the action of the train porter was willful.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1375, 1376.]

3. SAME—WILLFULNESS.
   In an action for injuries to a passenger by being pushed from a car platform by the car porter while the train was in rapid motion, evidence *held* insufficient to warrant a finding that the porter's act was willful or other than accidental or negligent.

4. EXCEPTIONS, BILL OF—CONSTRUCTION.
   Where, in an action for injuries to a passenger, defendant claimed that certain acts occurring at the trial with reference to the extent of plaintiff's injuries unduly influenced the sympathies of the jury, and applied for a new trial on that ground, but the trial judge in denying a new trial did not specifically find that undue influence and prejudice had in fact occurred, the bill of exceptions on a writ of error should be construed to

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mean that, while the facts were as stated, the jury were not unduly influenced thereby.

Shelby, C. J., dissenting.

In Error to the Circuit Court of the United States for the Northern District of Mississippi.

This is a suit brought originally by James Warren against the Illinois Central Railroad Company to recover damages for personal injuries received under the following circumstances, as detailed by himself on the witness stand:

"Q. Is this James Warren?
"A. Yes, sir.
"Q. Now, you speak to the jury over here, these gentlemen sitting in that box. Where do you live, Mr. Warren?
"A. I live in Pontoc county, close to Thaxton, a mile the other side of Thaxton; what they call 'Butter Milk Springs.'
"Q. Are you the plaintiff in this case against the railroad company?
"A. Yes, sir.
"Q. Just tell these gentlemen here how you came to bring this suit, and what caused this. Did you have anybody in your employ? If so, who?
"A, Yes, sir; I had a nigger, Andy McGlon.
"Q. Where were you living when you had him in your employ?
"A. A mile and a half the other side of Thaxton; the other side of Cain Creek.
"Q. How old are you, Mr. Warren?
"A. Thirty-two years old, going on 33.
"Q. When were you hurt by the railroad company?
"A. Last February, a year ago.
"Q. What was your occupation at the time you were hurt?
"A. Farming.
"Q. Have you any family?
"A. Yes, sir.
"Q. What?
"A. My wife and two children.
"Q. The little fellows here?
"A. Yes, sir.
"Q. Where did you go that day?
"A. Taylor's depot.
"Q. What did you go for?
"A. I went after Andy McGlon, that nigger.
"Q. Now, you went there after Andy. Do you know what day of the week that was?
"A. Tuesday.
"Q. Well, when you got down there, Mr. Warren, what did you do at Taylor? Did you get him or not?
"A. Yes, sir.
"Q. Anybody with you?
"A. Yes, sir.
"Q. Who?
"A. J. H. Kelly.
"Q. Is he here now?
"A. Yes, sir.
"Q. Well, did he come or not with you from Taylor's?
"A. Yes, sir.
"Q. Now, when you were coming north on the train from there—Taylor's is south of here, is it not?
"A. Yes, sir.
"Q. You came from Taylor's here. Who came with you on that trip?
"A. Me and Andy McGlon and J. H. Kelly.

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"Q. What occurred, if anything, when you were nearing the station of Oxford? Tell the jury now about that in your own way.

"A. Well, the porter came running through the train hollowing 'Oxford! Oxford!'

"Q. What porter?

"A. The nigger porter.

"Q. Porter of what? Train porter, or what?

"A. Yes, sir; the train porter.

"Q. Go on, now. He came through hollowing 'Oxford! Oxford!'

"A. Yes, sir; and I set there a while and got up and walked in through that box into the other one—

"Q. You say box—what do you mean by 'box'?

"A. Well, car; box car.

"Q. Were you in the smoking compartment, or negro coach, or ladies' coach, or where?

"A. I was in one part of the smoker. There is a partition in the car there.

"Q. You were in which one?

"A. I was in the back part of it, and I got up and went in where the nigger was, in the coach where the niggers were; and I told him to get up, that we were at Oxford now, and I was fixing to get off, and I walked to the door, and the nigger gets up and follows me.

"Q. Where was Kelly?

"A. Just behind the nigger.

"Q. How close was he there?

"A. He was right there behind the nigger, and the nigger was right at me.

"Q. Did you see them?

"A. Yes, sir.

"Q. Now, when you got to that door, was that the front end or the back end of that car?

"A. The front end.

"Q. Of the car?

"A. Yes, sir.

"Q. Had you passed the overhead bridge here south of the depot at Oxford when you got there to the front door?

"A. Yes, sir; it had passed there.

"Q. Passed the bridge?

"A. Yes, sir; and I opened the train door with this hand.

"Q. Which hand is that?

"A. The left hand; and I caught the facing of the door with this hand.

"Q. That is your right hand?

"A. My right hand; and I stepped with my left foot out in front of the door with my right foot on the door facing, standing, there waiting for it to stop for me to step off, and the nigger porter run against me and knocked me off.

"Q. Did he have anything in his hand?

"A. He had a lantern; a light.

"Q. Did you see him waving that, or anything of the sort?

"A. Yes, sir; he was waving a light and hollowing 'Oxford!'

"Q. You say he knocked you off?

"A. Yes, sir.

"Q. Did you strike anything when you went off?

"A. Yes, sir; hit my head on the switch.

"Q. Struck your head against the switch?

"A. The switchboard, they said that's where I hit. I don't recollect nothing about it after I got knocked off.

"Q. You say the porter with that lantern in his hand ran against you and pushed you off?

"A. Yes, sir; he run against me and knocked me off.

"Q. What were you doing at the time?

"A. I was just standing still, perfectly still, with my hand on the facing of the door.

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"Q. You say he called the station out how many times?
"A. He called it out two or three times. He called it out as he went through, and he called it out as he came back through.
"Q. And that's the time you were taking this Andy McGlon out at the front end?
"A. Yes, sir.
"Q. And he run against you and knocked you off?
"A. Yes, sir; he run against me and knocked me off."

On cross-examination he testified:

"Q. Now, Mr. Warren, who went with you, did you say, to Taylor's?
"A. Mr. J. H. Kelly.
"Q. What did you go there for?
"A. Andy McGlon.
"Q. What had Andy McGlon done?
"A. I had him hired, and Andy went off and never come back, and I went after him.
"Q. Well, you got him, did you?
"A. Yes, sir.
"Q. And you three came back on the train?
"A. Yes, sir.
"Q. When you got on at Taylor's depot, you and Mr. Kelly both got on the train with Andy in the colored coach?
"A. No, sir; we didn't.
"Q. Are you sure about that?
"A. Yes, sir; I am sure about it. I went in the colored coach with him, but I went out.
"Q. How came you to go out?
"A. The conductor asked me did I have him under arrest, and I told him 'No'; that I did not.
"Q. What then?
"A. I had him because he was owing me and had run off from me.
"Q. Why did you get in the colored coach with him?
"A. Well, I wanted to keep him with me. I didn't want him to have any chance to get away from me.
"Q. You were, then, guarding him, were you?
"A. Yes, sir.
"Q. You were watching him pretty close, too, weren't you?
"A. Yes, sir.
"Q. When you got to Oxford and the station was called, you were then riding in the rear part of the coach, the smoking compartment?
"A. I was back in the white coach.
"Q. The colored coach where you went first and where Andy stayed was divided into two compartments, was it not?
"A. Yes, sir.
"Q. The front part of the coach was for colored passengers?
"A. Yes, sir; and one part of it was used for the whites.
"Q. For a smoking car, was it?
"A. It had white people in there. I don't know what it was used for.
"Q. Now, when the conductor asked you if Andy was a prisoner and you told him 'No', he told you to get back in the other coach, didn't he; that you couldn't ride in the colored coach?
"A. Yes, sir.
"Q. And when the station was called out you got up and went out of the white people's coach through the colored coach to the front door?
"A. Yes, sir.
"Q. Why did you do that?
"A. I done that because I wanted to get off and get away as quick as I could.
"Q. Wasn't it easier to get off at the end of the coach in the part that you were in, and isn't that the place that people usually get off out of that part of the coach?
"A. [No answer.]



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"Q. Isn't it true that people in that part of the car riding there usually get off at the rear end of that coach, at the end between that and the ladies' coach?

"A. I don't know much about that part of it. I generally get off at the front end of the car.

"Q. Even if you have to go no further to do it, and even if you have to go through the colored coach to do it, isn't that true?

"A. No, sir; I wouldn't have went through the colored coach if I hadn't had him there.

"Q. What 'him' did you have there?

"A. I went through there after my nigger.

"Q. And you went to the front door to be there when he got off, isn't that true?

"A. I went to the front door to be with him when he got off.

"Q. To keep him from escaping?

"A. Well, I don't know as he would have run off, but I didn't want to give him no chance to get away from me. It was dark.

"Q. And that is why you went that way?

"A. Yes, sir.

"Q. Now, this colored porter, you say he came first from the colored coach into the white coach calling out the station?

"A. Yes sir.

"Q. Said, 'Oxford! Oxford! all out for Oxford!'?

"A. 'All out for Oxford!'

"Q. And you got up and preceded him back to the front end, didn't you; went ahead of him?

"A. No, sir.

"Q. Well, who got there first to the front end of the car?

"A. I got there first.

"Q. Then the colored porter came into the front end of the car after you did?

"A. Yes, sir; he came running right in behind me.

"Q. He was running, was he?

"A. He wasn't you [to] say running. He was trotting.

"Q. With a lantern in his hand.

"A. Yes, sir; with a light in his hand.

"Q. What did he do when he got to the door?

"A. I was still standing in the door, right foot on the facing of the door, and left foot on the platform, and right hand on the facing of the door, waiting for the train to stop at the station and to step off, and he run against me and knocked me off.

"Q. Well, what was he doing? You said something while ago about his signaling?

"A. He was waving his little light, or little lantern."

Warren's brother-in-law, J. H. Kelly, corroborated Warren's evidence, and further testifies that after Warren was knocked off the train he, Kelly, ran out of the door and ran to the bottom of the steps and stood there until the train slowed up and he got off.

The railroad company pleaded the general issue and contributory negligence. On the trial in the court below, after all the evidence was offered, counsel for railroad company moved the court for a peremptory charge to the jury to find for the defendant, which charge was refused and exception duly taken. The jury returned a verdict on which there was judgment for the plaintiff in the sum of $10,000. A motion for a new trial on many grounds was made and overruled.

The bill of exceptions duly signed and allowed concludes as follows:

"During the entire progress of this trial the plaintiff, James Warren, was brought into the courtroom upon a cot, and with the appearance of a hopeless and helpless cripple for life, with a pale, pinched face and emaciated form,

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gave constant evidences of intense and extreme suffering, with frequent groans and pitiable exhibitions of his helpless condition, constantly attended by his wife and two small children, who, in turn, ministered to him, which picture was paraded before the jury with every detail faithfully carried out to play upon and unduly excite the sympathies of the jury. When counsel asked his doctor to examine him, Warren exclaimed with an agonizing appeal not to touch him. Later his attorney proposed to exhibit his physical condition to the jury, but Warren protested so appealingly that the jury with one accord asked that he be not molested. These heart-rendering scenes were so frequent and constant that they, in fact, constituted the opening and closing argument in the case. Its far-reaching appeal and powerful influence upon the jury is forcibly mirrored by their verdict in the case."

The principal errors assigned in this court are:

"Third. The court erred in refusing to grant the peremptory charge asked by the defendant below, wherein it was sought to have the court instruct the jury to find for the defendant below; which was then and there excepted to, as shown by the bill of exceptions on file."

"Fifth. The court erred in refusing to set aside the verdict rendered by the jury in this case (1) because the verdict was excessive, and clearly the result of prejudice and passion excited by the claim that the negro porter had knocked a white man (plaintiff) off the car; (2) and as a result of sympathy for the plaintiff, who was paralyzed, and was lying upon a cot, and was constantly giving evidence of extreme pain and suffering, and was attended by his wife and several small children."

Edward Mayes, for plaintiff in error.

W. V. Sullivan, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts). On a railway passenger train the announcement of the next station, although made on near approach to said station, is not an invitation to a passenger to leave his seat and attempt to alight before the train actually stops. This proposition is supported by Adams' Adm'r v. Louisville, etc., R. Co., 82 Ky. 607; Railroad Co. v. Asbell, 23 Pa. 147, 62 Am. Dec. 323; Jeffersonville, etc., R. v. Hendricks' Adm'r, 26 Ind. 228; England v. Boston, etc., R. Co., 153 Mass. 490, 27 N. E. 1; Lewis v. London, etc., R. Co., L. R. 9 Q. B. 66; Bridges v. North London, etc., R. Co., L. R. 6 Q. B. 377.

According to Warren's evidence, corroborated by his main witness, his brother-in-law, Kelly, on the announcement of the train porter that the next station was Oxford, Warren, for the purpose of resuming custody of the negro McGlon and of getting off and away quickly, left his seat in the smoking compartment while the train was in motion, and went forward through the colored compartment to the front door of the car, which he opened, and stood there waiting evidently for the train to slow down, with his right foot on the door sill, his left foot on the platform, and his right hand on the door facing, from which position he was knocked or pushed, so that he fell off the car while the train was in rapid motion, and thereby was injured In thus going to the front of the car and taking the position described while the train was in rapid motion Warren was guilty of negligence, which unquestionably contributed to his subsequent injury. See Alabama R. Co. v. Hawk, 72 Ala. 112, 47 Am. Rep. 403; Blodgett v. Bartlett,

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50 Ga. 353; Beemis v. Railroad Co., 47 La. Ann. 1671, 18 South. 711; Quin v. Railroad Co., 51 Ill. 495; Rockford Co. v. Coultas, 67 Ill. 398; Railroad Co. v. Green, 81 Ill. 19, 25 Am. Rep. 255; Malcomb v. Railroad Co., 106 N. C. 63; 11 S. E. 187; President, etc., v. Cason, 72 Md. 377, 20 Atl. 113; Goodwin v. Railroad Co., 84 Me. 203, 24 Atl. 816; Secor v. Toledo, Peoria & W. R. Co. (C. C.) 10 Fed. 15. According to Warren's evidence, he was pushed or knocked off by the train porter. Neither he nor any of his witnesses testify as to whether the action of the train porter was accidental, negligent, or intended and willful. If the action of the train porter was accidental or even negligent, but not willful, Warren cannot recover from the railroad company, because in taking his position in the door and on the platform of the car, under the circumstances conceded in his evidence, he was guilty of negligence which contributed to his own injury. If the action of the train porter was willfully intended, then Warren can recover, because it is the duty of a common carrier to warn and protect and not to injure a passenger, who may have even negligently exposed himself to injury. A careful analysis of the evidence of Warren and his witnesses, giving full effect thereto and reinforcing the same with the deductions that reasonable men may draw therefrom, brings us to the conclusion that there was no evidence nor deduction from the same sufficient to warrant a finding that the train porter was guilty of willfully pushing or knocking Warren as he stood in the door and on the platform of the moving car. On the whole evidence, direct and circumstantial, the jury would have been fully warranted in finding that the train porter had nothing whatever to do with pushing or knocking Warren from the car.

We conclude that on the evidence of the plaintiff and his witnesses the peremptory instruction to find for the defendant on the issue of contributory negligence should have been given. If the concluding statement in the bill of exceptions means that the jury was unduly influenced in their verdict by their feelings and sympathies for the plaintiff, Warren, and his miserable condition, the trial judge should have granted a new trial on that ground. As, however, the statement of the judge does not specifically find the undue influence and prejudice as a fact, and as he refused a motion for a new trial based on this and other grounds, we must construe the bill of exceptions to mean that, while the facts were as stated, the jury was not unduly influenced thereby.

The judgment of the Circuit Court is reversed, and the cause is remanded, with instructions to set aside the verdict and grant a new trial.

SHELBY, Circuit Judge (dissenting). I respectfully dissent from the opinion just read.

The record shows that on February 3, 1904, James Warren was a passenger on one of the passenger trains of the plaintiff in error. As the train was approaching the station at Oxford, the porter announced the fact by calling, "Oxford! Oxford!" Warren arose from his seat, went to the front door of the coach, opened it, and while standing with one foot on the platform just outside the door, and one foot in the car or on the door sill, holding the door facing with his right hand,

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one of the plaintiff in error's servants, the porter of the train, with a lantern in his hand, ran against him and knocked him off the platform, causing him to fall against a switch. By the fall his thigh bone was broken, and the doctor called to see him found the end of the bone "sticking out of his back." He was otherwise so mangled that he died, his death occurring subsequent to the trial and verdict below, and the writ of error is prosecuted against his administratrix.

Warren's account of the accident has been given in the statement of the case by the court. His version is corroborated by J. H. Kelly, who, after describing Warren's position in the door "with his hand placed on the door facing," said that the porter "came rushing through with his lantern, ran against Warren, and knocked him out of the door and clean off to the ground." The plaintiff in error, being a common carrier, was bound, so far as practicable, to protect its passengers, while it was carrying them, from violence committed even by strangers; and there surely can be no doubt that it undertakes absolutely to protect them against the violence and misconduct of its own servants engaged at the time in executing the contract. Stewart v. Brooklyn & Crosstown R. R. Co., 90 N. Y. 588, 591, 43 Am. Rep. 185, and cases there cited; Dwinelle v. N. Y. Central & H. R. R. Co., 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611.

It is said in the opinion of the court that "on a railway passenger train the announcement of the next station is not an invitation to a passenger to leave his seat and attempt to alight before the train actually stops." I cannot see how the cases cited to sustain this statement are applicable, because the evidence on which Warren submitted his case to the jury was to the effect that the railway porter had knocked him off the train when he was standing holding to the door facing. Neither of the two witnesses on which he relied to show the negligence or violence of the porter testified that he left his seat and made "an attempt to alight before the train actually stops." It is stated in the opinion of the majority that, "on the whole evidence, direct and circumstantial, the jury would have been fully warranted in finding that the train porter had nothing whatever to do with pushing or knocking Warren from the car." Conceding that to be true—while I take a different view of the evidence—the court has not the right, I think, to take a case from the jury because there is evidence which would warrant a verdict for the defendant. The question of the credibility of Warren and Kelly was for the jury.

The court below submitted the question of contributory negligence to the jury. The opinion just read is to the effect that Warren, on the evidence quoted, was guilty of contributory negligence as matter of law, for it is decided that the trial court should have instructed a verdict for the defendant. In Washington & Georgetown R. R. Co. v. Harmon's Adm'r, 147 U. S. 571, 580, 13 Sup. Ct. 557, 37 L. Ed. 284, the court, commenting on a case where the person injured was standing on the step of the car, observed:

"There was a conflict of evidence as to the condition of the platform, the position of the plaintiff, and the circumstances surrounding the accident. It is conceded that to be upon the platform, or even upon the step, might not

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be negligence in all cases, *and certainly not negligence in law*, but it is insisted that the plaintiff was voluntarily riding upon the step of the car when moving, without any means of support, and that this, in the absence of justification or excuse, would necessarily be negligence." (The italics are mine.)

I cannot concur in the view that it is negligence per se for a passenger to arise from his seat when the porter calls the station where he is to alight, and to walk to the door of the car and take the position described in the evidence. Under the circumstances, it could not be deemed negligence per se "if he stood on the steps of the car." Brashear v. Houston Central A. & N. R. Co., 47 La. Ann. 735, 17 South. 260, 28 L. R. A. 811, 49 Am. St. Rep. 382; Watkins v. Bham Ry. & E. Co., 120 Ala. 147, 152, 24 South. 392, 43 L. R. A. 297; Pa. R. Co. v. Reed, 60 Fed. 694, 9 C. C. A. 219; Doss v. M. K. & T. R. R. Co., 59 Mo. 27, 38, 21 Am. Rep. 371. If it is "certainly not negligence in law" to stand on the steps, can it be negligence in law to stand in the door, holding the door facing with the right hand, when the station which is the end of the passenger's journey has been called, and the car is about to stop?

If it were true that Warren was guilty of negligence in taking the position he assumed, it would not be a defense to this action if the conduct of the company's employé, while engaged in the master's service, was intentional and willful. Contributory negligence is not a defense against a willful injury. Beach on Cont. Negl. (3d Ed.) §§ 64, 65; 7 Am. & Eng. Ency. of Law, p. 443. From the violence of the assault which the porter made on Warren, as well as from other facts and circumstances shown in the evidence, the jury might reasonably have concluded that the assault on him was intentional and willful, and in that event the defense of contributory negligence could not have prevailed. In either aspect of the case, the learned trial judge, in my opinion, ruled correctly in refusing to direct a verdict for the defendant.

If the evidence of Warren and Kelly was true, the jury was reasonably justified in finding a verdict for the plaintiff. Taking the case from the jury, therefore, cannot be reconciled with the principles announced in Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, nor with the decisions of this court. Nelson v. N. O. & N. E. R. Co., 100 Fed. 731, 40 C. C. A. 673; Texas & Pacific Ry. Co. v. Carlin, 111 Fed. 777, 49 C. C. A. 605; Southern Pacific Co. v. Covey, 109 Fed. 416, 48 C. C. A. 460; Mexican Central Ry. Co. v. Townsend, 114 Fed. 737, 52 C. C. A. 369. In Jones v. E. T., V. & G. R. R. Co., 128 U. S. 443, 9 Sup. Ct. 118, 32 L. Ed. 478, Mr. Justice Miller made an observation, evoked, I think, by the fact that trial courts have been too quick to take cases involving personal injuries from the juries:

"We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others."

A similar admonition is found in a single sentence of a recent act of Congress—"All questions of negligence and contributory negligence shall be for the jury." Act June 11, 1906, c. 3073, § 2, 34 Stat.

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232. The act has no application here, except to show, as does Mr. Justice Miller's observation, that no evolution of the law is in progress that tends to deprive an injured plaintiff of the right to submit his case to a jury.

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(149 Fed. 423.)

WEST DISINFECTING CO. et al. v. FRANK et al.

(Circuit Court of Appeals, Second Circuit. December 4, 1906.)

No. 220.

PATENTS—INFRINGEMENT—DESIGN FOR CASING FOR DISINFECTANT.

The Taussig design patent, No. 33,633, for a design for a casing for disinfecting apparatus is valid; the attractive appearance of the casing shown rendering it popular with users, notwithstanding original structural defects. Also, *held* infringed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 146 Fed. 388.

L. C. Raegener, for appellants.

W. H. Kenyon, for appellees.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The conclusion of the court below as to the novelty of the patented design is supported by a comparison thereof with those of the prior art. The reduction in the diameter of the annular band of perforations and its rearrangement in the upper portion of the cylindrical body, so as to leave a closed portion of said body extending above the band, and the introduction of the graceful rounded ends, which, while carrying out the outline of the cylinder, suggest a firm and substantial support, as distinguished from the Lewis structure, with its ends shaped like a coffee pot cover and its projecting shoulders, are persuasively illustrative of an artistic sense of harmonious proportion, producing a pleasing effect, which is not found in the structures of the prior art.

If there be a doubt as to whether these departures constituted invention, it should be resolved in favor of the patent, not only by reason of the presumption arising from the grant, but also because the patented construction was adopted and retained on account of the novelty of the design, notwithstanding the original objections of corrosion and leakage, resulting from its peculiar conformation, which necessitated repairs and ultimately resulted in a substitution of a new material for the bottom, and, furthermore, because of the evidence as to the much greater popularity of the new design, because of its attractive appearance, and, finally, because of the actual bodily imitation by defendants of the exact patented construction, under circumstances which indicate an inequitable attempt to appropriate the benefits shown to have resulted from the harmonious arrangement and proportions of the patented design.

The decree is affirmed, with costs.

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(149 Fed. 1023.)

## FRANK v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. December 20, 1906.)

No. 81 (3,754).

CUSTOMS DUTIES—CLASSIFICATION—REMANIT—MANUFACTURES OF SILK.

So-called remanit, in the form of ropes, braids, and mats, which has been manufactured from silk produced by carbonizing rags containing silk, *held* to be a manufacture of silk, within the meaning of Tariff Act July 24, 1897, c. 11, § 1, par. 391, Schedule L, 30 St. 187 [U. S. Comp. St. 1901, p. 1670].

Appeal from the Circuit Court of the United States for the Southern District of New York.

This appeal is taken from a decree of the district court affirming a decision of the Board of United States General Appraisers.

In the decision below (G. A. 5,854, T. D. 25,779) the Board of General Appraisers affirmed the assessment of duty by the collector of customs at the port of New York on an importation by Emil Frank, which was classified under paragraph 391, Schedule L, § 1, c. 11, Tariff Act July 24, 1897, 30 St. 187 [U. S. Comp. St. 1901, p. 1670].

The opinion filed below, and here reprinted from 143 Fed. 702, was in full as follows:

HAZEL, District Judge. The importation is classified by the collector as a manufacture of silk not specially provided for, and was assessed for duty by the collector at 50 per cent. ad valorem under the existing tariff act. According to the appraiser, the merchandise consists of "packing for machinery, made of silk, and of silk and metal, silk chief value," The protestant claims that the merchandise is silk waste, and exempt from duty under section 2, Free List, par. 661, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1688] or dutiable under section 6 of the tariff act of July 24, 1897 (30 Stat. 205, c. 11 [U. S. Comp. St. 1901, p. 1693]), at 10 per cent. ad valorem, or that said merchandise was partly manufactured, and therefore dutiable at 20 per cent. ad valorem under said section 6 of the existing tariff act. The evidence, however, does not support the claim. The merchandise, which is called "remanit," is a nonconductor of heat, and generally used as a wrapping or covering for steam pipes and boilers. The proofs show, as stated in the decision of the Board, that "remanit" is made—

"from silk rags, some of which may contain an admixture of cotton and wool; the rags being placed in a large drum which is charged with various acids, the purpose being to destroy the cotton and wool by the process known as carbonization. The carbonized silk thus obtained is bound together with metal threads, and made in the form of ropes about 1¼ inches thick, or braids about ⅝ of an inch thick, or into mats, as may be desired."

It may be remarked in passing that many ways have been devised to utilize all waste products, and different methods have been devised by modern industries to turn things hitherto regarded as valueless into

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articles of great usefulness; but the evidence here indicates, as found by the Board, that the merchandise is not silk waste, and to produce it the article chiefly used is composed of silk.

The decision of the Board of General Appraisers is right, and it is therefore affirmed.

Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for importer.

D. Frank Lloyd, Asst. U. S. Atty.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. Affirmed on opinions of Board of General Appraisers and Circuit Court.

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(149 Fed. 678.)

## LOWDON et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. December 31, 1906.)

No. 1,588.

1. CRIMINAL LAW—INDICTMENT—PLEA—FILING—TIME.

A plea attacking an indictment alleged that it had been found by a grand jury two of the members of which had been chosen from the bystanders, which had "greatly prejudiced defendant." The plea was not filed until after the indictment had been filed and entered, or until 17 days after defendant had returned to the state. The only excuse given for not interposing it sooner, was that defendant was not present when the grand jury was selected, but was absent, and remained absent from the state until a time later than the return of the indictment. *Held*, that the plea was not filed in time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 643.]

2. SAME—TRIAL—ARGUMENT OF COUNSEL.

Where accused offered no evidence to prove his good character, and was therefore entitled to rely on a legal presumption that his character was good, it was prejudicial to accused for the prosecuting attorney, in making a strong appeal to the jury to assume that defendant's character was bad because of his failure to prove the contrary, defendant's objection thereto having been overruled, and the district attorney not having withdrawn the argument.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1673, 1674.]

3. SAME.

Where, in a prosecution of certain bankers for violating the national bank act, one of defendants' attorneys in argument appealed to the jury saying: "Six of you cannot return a verdict, nor 11, but it takes 12 men to reach a verdict," the intent being to acquaint each juror with his power and responsibility, it was prejudicial error for the district attorney in reply to state that, if a juror decided that defendants were not guilty, when

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**the juror returned home "his neighbors might conclude that the jingle of the broken bankers' unlawfully and ill gotten gold in his pocket" had influenced his action and decision.**

**[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1676, 1680.]**

In Error to the District Court of the United States for the Northern District of Texas.

Geo. E. Miller and S. P. Hardwicke (Matlock, Miller & Dycus and Hardwicke & Hardwicke, on the brief), for plaintiffs in error.

William H. Atwell, U. S. Atty.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. The defendants, James G. Lowdon, president, and Otto W. Steffins, vice president, of the American National Bank of Abilene, Tex., were indicted in the court below for violations of section 5209 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3494]. There were 31 counts in the indictment. The district attorney withdrew or dismissed 2 of the counts. Lowdon was found guilty on 16 counts, and Steffins on 6 counts. Judgment was entered on the verdict, and the defendants were sentenced to be confined in the penitentiary for a period of five years. They brought the case here on writ of error.

The indictment was returned and filed on March 21, 1906. Nineteen days afterwards, when the case was called for trial, the defendant Lowdon filed a plea in abatement. The substance of the plea was that of the regularly summoned grand jurors, only 15 were in attendance, whereupon the court ordered the marshal to summon two more grand jurors in order that the grand jury should be composed of 16 members. It is alleged in the plea that the marshal called two men who were in attendance on the court, and who had been summoned as petit jurors. As a reason for not interposing the plea sooner, it was stated:

**"This defendant says that he was not present in said court at the time of the selection, summoning, and impaneling of the grand jury aforesaid, he then being absent from the state of Texas, and remained so absent from the state of Texas until a time later than the return of the said indictment."**

The plea contained no averment of specific facts to show that the defendant had been prejudiced or injured by the selection of the two grand jurors in question. The general statement was made that the defendant had been "greatly prejudiced" by the improper and illegal selection, etc., but no fact was alleged showing injury, except that the grand jury so organized found the indictment. The government, by the district attorney, demurred to the plea, because it failed to show that the defendant was injured, and because it failed to show that the requisite number of jurors did not return the bill of indictment. The court sustained the demurrer, and this action of the court is assigned as error.

Section 808, Rev. St. U. S., c. 86, 13 Stat. 500 [U. S. Comp. St. 1901, p. 626], is as follows:

**"Section 808. Number of grand jurors; completing jury. Every grand jury empaneled before any district or circuit court shall consist of not less**

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than sixteen nor more than twenty-three persons. If of the persons summoned less than sixteen attend, they shall be placed on the grand jury, and the court shall order the marshal to summon, either immediately or for a day fixed, from the body of the district, and not from the by-standers, a sufficient number of persons to complete the grand jury. And whenever a challenge to a grand juror is allowed, and there are not in attendance other jurors sufficient to complete the grand jury, the court shall make a like order to the marshal to summon a sufficient number of persons for that purpose."

The contention of the defendant is that this statute was violated by the procedure, because the marshal completed the grand jury by summoning two bystanders. It does not appear in what terms the order of the court was made, or that any order was entered on the minutes. We do not think the plea makes a statement that calls for a construction of the statute. An objection of this kind should be made at the earliest day that the defendant has an opportunity to make it. The plea may be true, and yet the defendant may have delayed 17 days in filing it after his return to the state, and after the bill was filed and entered. In Agnew v. United States, 165 U. S. 36, 45, 17 Sup. Ct. 235, 41 L. Ed. 624, a delay of five days was noted in treating the plea as insufficient. In that case, it was also held that the general words, that the action complained of "tended to his (defendant's) prejudice," was not sufficient. Without considering whether the statements of the plea were otherwise sufficient, we hold that the demurrer was properly sustained on the authority of Agnew v. United States, supra.

On the trial of the case below, exceptions were taken by the defendants to certain arguments and statements made to the jury by the district attorney. For convenience of reference, these statements or arguments will be numbered 1 and 2. They are as follows:

"(1) Now, gentlemen, has a single man come upon this stand and told you about the character of Lowdon as to his honesty? That matter has been put in issue by these charges and this testimony here. Has one? No one; not one; not one! I concede you, my friends, that it is hard, but I am going to say it, it is a hard thing to say, but I ought to say it; that is what I am here for. I am here to prosecute this case, as I say, God Almighty being my helper, as fiercely and strongly as I may consider is fair. When that man is charged with an offense, or any other man, right at that instant his reputation comes in question, and he may support it by the testimony of his people as to its goodness. I could not put a witness on and show that it was not good, except as I have done by the testimony in this case. It is then passed up to him; it is his play. Another thing, you need not tell me that these five attorneys here—the best that could be gotten—strong men personally, and strong men mentally; you need not tell me that these attorneys overlooked any bets—to use the common expression. Don't you know that if he could have found any witness who would have testified to his good character he would have done so? But he brings not one! Not one. * * *

"(2) As Mr. Cunningham has said to you, that six men cannot return a verdict of guilty in this case, nor can eleven; that it is required that 12 men shall agree before these men can be convicted. In this connection I want to suggest to you, gentlemen of the jury, that I would hate to be the obstinate man on this jury who would hang out against a verdict of guilty with his fellows in a case like this, where a national banker is on trial for embezzlement, misapplication and abstraction of the property and funds of this bank, to the detriment of suffering depositors; because, when I returned home my friends and neighbors, who possibly are not versed and familiar with the various technicalities and intricacies of the law, might conclude that the jingle of the broken bankers' unlawfully and illy gotten gol! in my pocket had influenced my action. Occupying the position I do, I can-

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**not do less than my whole duty in this case in the prosecution of these defendants, for fear that it might be said of me that I had received money in addition to my salary."**

When each of the foregoing arguments was made to the jury by the district attorney, the cousel for the defendants made objection. The court overruled the objections, and permitted the district attorney to proceed with the argument, whereupon exceptions were duly reserved by the defendants. After the conclusion of the argument in the case, the defendants requested charges which, in effect, instructed the jury to disregard these arguments, the charges being properly framed to remove any improper influence that the arguments might have had upon the jury. The court declined to give each of these charges, and exceptions were again duly reserved. The bill of exceptions shows that the attorneys for the defense, in their arguments to the jury, had, without objection, made observations to which, it is claimed, the district attorney's remarks were intended to reply.

The chief function of the legal profession is the administration of justice. The duties of the bench and bar are, to this extent, alike. The purpose of both is to establish the truth, and to apply the law to it. To ascertain the truth is often difficult, and the united labor of the advocate and the judge often, it is feared, fails to accomplish the desired result. But the experience of all civilized countries shows that a trained body of men, advocates and judges, each class performing its respective duties, is required even to approximate success in the establishment of the truth. Forensic strife and the cross-examination of witnesses are the methods best adapted to the ascertainment of the truth. It is the duty of counsel to make the most of the case his client has given him. It is essential that all that is relevant to the case that can be said for each party in the determination of the fact and law should be heard. The very fullest freedom of speech, within the duty of his office, should be allowed to counsel. In addressing either court or jury, the advocate should be allowed to select and pursue his own line of argument, his own method of dealing with the evidence, and the application of the law to it. Every fact the testimony tends to prove, every inference he may think arises out of the testimony, the credibility of the witnesses, their intelligence, want of sense, or means of knowledge, are all legitimate subjects of discussion. Illustrations and analogies may be used, based on the testimony, history, science, literature, or current events. The court would never stop the advocate in his attempt to draw inferences, or to establish intention, from evidence that has been offered. Whether an inference of counsel is rightly drawn from the evidence is for the jury to determine. He may, of course, urge a fearless administration of the criminal law, and he may complain that juries are more inclined to acquit than to convict. On the other hand, for the defense, he may warn juries against harsh and hasty verdicts, and may invoke the mercies of the law. The field of legitimate speech and appeal is broad—broader than we can indicate here. But it is necessary to the proper administration of the law that there should be a limit to what the advocate is permitted to say to the jury. Cases are to be decided by

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juries upon the evidence, and when the evidence is offered by witnesses, the witnesses are subject to cross-examination. A defendant should not be subjected to a trial on the unsworn statements of an attorney conducting the prosecution, even when such statements are relevant to the case, for he would by this procedure be debarred the right of cross-examination and be also deprived of the right of offering evidence in rebuttal. It is not within the legitimate province of counsel to state facts pertinent to the issue that are not in evidence; nor can he assume in argument that such facts are in the case when they are not. And counsel cannot be permitted to make a statement of facts, which, under the rules of evidence, would not be received if offered, the natural tendency of such facts being to influence the finding of the jury. To adopt any other view would enable the advocate to put before the jury for their consideration statements not tested by cross-examination and facts which the law excludes.

Having said this much in relation to the subject generally, we first consider an assignment of error made by Lowdon alone. He offered no evidence to prove his good character. He unquestionably had the right to rely on the legal presumption that his character was good. Mullen v. United States, 106 Fed. 892, 46 C. C. A. 22. The excerpt from the argument of the district attorney, numbered 1, is a strong appeal to the jury to presume that the character of Lowdon was bad because he failed to offer evidence that it was good. This was not only getting out of the record, but going contrary to the legal presumption to which the defendant was entitled. It was assuming that the defendant's failure to offer such evidence created a presumption that his character was bad. This was not a legitimate and proper argument, and, on objection being made, the trial court should have stopped the district attorney and should have taken steps to remove, as far as possible, its influence upon the jury. But it is urged on behalf of the government that, conceding that the argument was not legitimate, it does not constitute reversible error. It is true that in like cases where the court sustains the defendant's objection to the argument and the words are at once withdrawn, it is held that the injurious effect is removed, and the incident does not constitute ground for a new trial. Dunlop v. United States, 165 U. S. 486, 498, 17 Sup. Ct. 375, 41 L. Ed. 799; Wright v. United States, 108 Fed. 805, 48 C. C. A. 37; Kellogg v. United States, 103 Fed. 200, 43 C. C. A. 179. But in this instance the district attorney did not withdraw the argument, and was sustained in making it by the action of the trial court. The principle which secures to every one accused of crime a fair and impartial trial on the evidence adduced is violated when the court permits the district attorney, against objection, to comment in argument to the jury upon the failure of the defendant to offer evidence of his previous good character. McKnight v. United States, 97 Fed. 208, 38 C. C. A. 115; Bennett v. The State, 86 Ga. 401, 12 S. E. 806, 12 L. R. A. 449, 22 Am. St. Rep. 465; Davis v. The State, 138 Ind. 11, 37 N. E. 397; Fletcher v. The State, 49 Ind. 124, 19 Am. Rep. 673; Thompson v. The State, 92 Ga. 448, 17 S. E. 265; The People v. Evans, 72 Mich. 367, 40 N. W. 473.

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The exceptions and assignments of error that relate to the second excerpt from the district attorney's argument were taken, and are made, by both of the defendants. One of the defendants' attorneys appealed to the jury, saying:

> "Six of you cannot return a verdict, nor eleven, but it takes twelve men to reach a verdict."

The intention was evidently to acquaint each juror with his power and his responsibility. Counsel on either side have a right to appeal to the conscience, sympathy, or sense of justice of the individual juror in any fair and legitimate argument. Each juror acts, in a measure, on his own judgment and conscience, influenced and aided, of course, by the counsel, advice, memory, and experience of his fellow jurors. But if defendants' counsel should submit an unlawful argument, or improper appeal to the jury, his violation of law or ethics would not justify the prosecuting attorney in taking a like course. His remedy would be to ask the court to stop the defendants' attorney when he clearly departed from a legitimate line of argument, or to request instructions that would remove the harmful effect. If a departure from the field of legitimate argument by one side was sufficient excuse for the other side to pursue the same course, it would possibly lead to the trial of cases upon the assertions and statements of counsel, and not on the evidence adduced.

In the second excerpt from the district attorney's argument, he asserted, in effect, that if a juror decided that the defendants were not proved to be guilty, when he returned home, "the neighbors * * * might conclude that the jingle of the broken bankers' unlawfully and illy gotten gold" in his pocket had influenced his action and decision. The plain meaning was, if you decide to acquit, your neighbors will say you have been bribed with money—with the "illy gotten" money of the defendants. Although we acquit the learned district attorney of intending any threat, a juror unacquainted with criminal procedure might reasonably have concluded that he was warned against a probable charge of receiving a bribe or of conspiracy.

In the case of People v. Mull, 167 N. Y. 247, 60 N. E. 629, the court of last resort in New York reversed the judgment of the trial court on account of the argument of the prosecuting attorney, although the court said that the "evidence in the record was ample to sustain the verdict." The argument of the prosecuting attorney in that case was that "a failure to convict cannot fail to excite widespread comment and indignation among the whole body of citizens of this country." In his address, the attorney said:

> "If there is a man who sits in those chairs that is willing to brand himself with suspicion by saying that Archie Mull did not commit this crime, my judgment of his character is not at all correct. * * * It is no wonder that your neighbors have concluded that the integrity and decency of this panel of jurors, instead of Archie Mull, is on trial here today."

The court held that this speech being permitted made it doubtful "whether the defendant had been fairly convicted," and the judgment was reversed.

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In Williams v. United States, 168 U. S. 382, 18 Sup. Ct. 92, 42 L. Ed. 509, the defendant, an officer of the United States, was convicted of extortion in exacting moneys from Chinese immigrants for permission to land and remain in the United States. The defendant proposed to show by witnesses that, while he was acting in such official position, "there were more females sent back to China than ever were sent back before or after." The representative of the government objected to this evidence as irrelevant, saying in open court, and presumably in the hearing of the jury:

"No doubt, every Chinese woman who did not pay Williams was sent back."

The Supreme Court said:

"The observation made by the prosecuting attorney was, under the circumstances, highly improper, and not having been withdrawn, and the objections to it being overruled by the court, it tended to prejudice the rights of the accused to a fair and impartial trial."

In Hall v. United States, 150 U. S. 76, 14 Sup. Ct. 22, 37 L. Ed. 1003, the judgment of the trial court was reversed, because the district attorney was permitted to make an argument, against the objection of the defendant, not based on evidence, which tended to prejudice the jury against the defendant. We would not embarrass free discussion, so essential to the proper administration of the law. We would not regard many hasty and exaggerated expressions of attorneys made in the heat of debate, which are not expected to become factors in the formation of the verdict. We wish to follow established rules, and to avoid introducing another element of uncertainty in the trial of criminal cases by making a new precedent for the reversal of judgments. The difficulty of drawing a line between legitimate and improper arguments admonishes us that the trial judge often has a delicate and difficult task imposed on him. But, under the circumstances of this case, considering the character of the argument, the refusal of the trial judge to interfere at the time the objection was interposed, or to correct the probable effect of the argument by a subsequent instruction, and because it does not appear affirmatively to us that no injury was done to the defendants, we are constrained to hold that the judgment should be reversed, and a new trial granted to both defendants.

We do not think it necessary to decide other questions raised. Demurrers were filed to each count of the indictment, and they were all overruled. The learned district attorney says in his brief that "if the court should conclude that the demurrers to counts 5 and 6 should have been sustained because of alleged duplicities," there still remain 14 "unimpeached and unassailable counts." We concur in the view of the district attorney that there are a number of good counts in the indictment, and, in view of the fact that the defendants may not again be put on trial on any count which the district attorney may now deem insufficient, it seems useless to enter on the examination of the various assignments of error relating to the demurrers to the several counts.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

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(149 Fed. 680.)

## CROOKSTON LUMBER CO. v. BOUTIN.*

(Circuit Court of Appeals, Eighth Circuit. November 30, 1906.)

No. 2,418.

1. MASTER AND SERVANT—HAZARDOUS BUSINESS—CARE REQUIRED.

Where a master was engaged in operating a steam sawmill, it owed a duty to its employés to exercise all reasonable care to provide them with suitable and reasonably safe machinery and instrumentalities with which to perform their work.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 173, 203.]

2. SAME—DEATH OF EMPLOYÉ—NEGLIGENCE—QUESTION FOR JURY.

In an action for the death of a sawmill employé, by being pushed against the saw by the log carriage, the fact that the carriage mechanism was so out of repair that the carriage would creep along the track toward the saw when the controlling lever was in a position intended to keep the carriage at rest was sufficient to present a question for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1010–1050.]

3. SAME—ASSUMED RISK.

Where decedent, a sawmill employé, gave notice to defendant of a defect in the log carriage, and secured a promise from the superintendent of the mill to repair the same, decedent did not assume the risk of injury caused by the defect in the carriage in continuing to work for a time thereafter reasonably sufficient to enable defendant to repair the carriage, unless the risk was so obviously and imminently dangerous that a person of ordinary prudence would not have taken it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574, 583, 587, 641, 644.

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

4. SAME—CONTRIBUTORY NEGLIGENCE—PROMISE OF REPAIR.

That decedent, a sawmill employé, gave notice to defendant of the defective condition of a log carriage, and secured a promise to repair, did not relieve him from the necessity of exercising reasonable care for his own safety in performing his duties, nor deprive the defendant of the defense of contributory negligence in case decedent failed to do so and was injured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 675, 676, 706–709, 724, 727, 729.]

5. TRIAL—QUESTIONS OF LAW OR FACT—DISPOSITION.

A question of law always arises at the close of the evidence in any case in the federal courts, whether there is any substantial proof warranting a verdict in favor of plaintiff; and, in determining such question, all the evidence and reasonable inferences therefrom must be considered in the light most favorable to plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 339, 402.]

6. SAME.

In order to justify the direction of a verdict, in an action tried in the federal courts, the undisputed evidence must be so conclusive that all reasonable men, in the exercise of an honest and impartial judgment, can draw but one conclusion therefrom, and that the court, in the exercise of a sound judgment, would be required to set aside a verdict returned in opposition thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 338, 340, 379, 383.]

* Rehearing denied February 12, 1907.

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7. MASTER AND SERVANT—DEATH OF SERVANT—CONTRIBUTORY NEGLIGENCE.

Decedent, an employé in a sawmill, before operations had commenced in the morning, took a position on the sawyer's side of the pulleys over which the band saw was operated, practically in front of the saw, and within two feet of it while it was being run at a high rate of speed. Decedent placed his left foot on the rail of the carriage track, and his right foot was raised and resting on a lower extension of the guard plank, his back being toward the log carriage. In this position plaintiff endeavored to clean sawdust from the upper pulley with a stick, and while doing so, the log carriage, the mechanism of which was defective, noiselessly crept up from behind him unobserved, and before he could escape, forced his body against the teeth of the saw, by which he was instantly killed. Decedent had knowledge of, and had complained of the creeping motion of the carriage, and had received a promise of repair two or three days before the accident; but, while standing in the position he occupied, he took no precautions to ascertain whether the carriage was still. The position that decedent took to clean the pulley was peculiar to him, and he could easily have occupied a different position where he would have been perfectly safe from the danger. *Held*, that decedent was guilty of contributory negligence, as a matter of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 729.]

8. SAME—REPAIR OF DEFECTS.

Where the repair of a log carriage mechanism in a sawmill would probably have involved a reconstruction of the valves leading into the carriage cylinder, and have required a general overhauling of the mill under and on which the connections between the boiler and the carriage were located, and an employé complained of a defect in the carriage, and obtained a promise of repair, it was the height of recklessness for him to presume, in the absence of any evidence that such repairs were in progress, that they had been made two or three days after the promise was given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 643, 645, 675, 706, 729.]

In Error to the Circuit Court of the United States for the District of Minnesota.

Marie F. Boutin, as administratrix of the estate of Frank Boutin, deceased, brought this action against the lumber company to recover damages for the death of the decedent who was her husband. The lumber company was operating a steam sawmill at Crookston, Minn. Logs were hauled from the river and rolled upon a deck at the north end of the mill from which, as needed, they were separately rolled upon a carriage which carried them up against a vertically running band saw to be worked into lumber. This carriage was about 60 feet long, constructed of wood and iron, and sufficiently heavy, bulky, and strong to steadily support and carry a large log. It was connected with a piston rod driven by steam conducted from the boiler to the cylinder through adjustable valves connected by rods and cranks with the operating lever located on the west side of the track on which the carriage ran. The head sawyer, by operating the lever, could so open and close the valves as to run the carriage back and forth past the saw as business required. When the carriage was not in operation, the lever stood upright or perpendicular. A forward push of the lever started the carriage forward from the log deck, and a backward pull stopped the progress of the carriage and returned it to the starting point for another similar movement. The day crew began work at 7 o'clock in the morning, but at 5 minutes before 7, the mill was started up to secure the proper speed of the saw before work began. The saw was a continuous band of steel with teeth on one edge only, so operating around two large pulleys revolved by steam power, and so located at the west side of the track as to present its toothed edge



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to the end of the carriage as it brought a log up against it for sawing. This preliminary start put the pulleys and saw only into motion. It was not intended to, and did not, cause the forward and backward movement of the carriage. The crew consisted among others of the head sawyer, who, among other duties handled the lever for operating the carriage, and whose place was in front of the pulleys about three feet west of the carriage track, and a tail sawyer, who, among other duties, took off the sawed product from the carriage after the log had passed the saw, and whose place was behind the pulleys, a safe distance west of the track. The flying sawdust produced by the operation of the mill collected on the inside of the rim of the upper pulley, and, in order to keep the machinery in proper adjustment, required frequent removal. The rim was about 12 inches wide, and was supported by spokes leading from the hub to it, leaving a few inches on either side of the spokes so exposed as to be readily cleaned by holding a stick fast against it and permitting the revolving wheel to pass it. This operation of cleaning off the sawdust was generally performed while the mill was speeding up preparatory for beginning work. The head sawyer's business was to clean the side of the rim next to him, and the tail sawyer's business the side next to him. The place where the head sawyer stood to operate his lever was so near to the rim of the pulley that he could reach it with the usual stick employed for the purpose of cleaning it. There was a guard consisting of an upright plank between his standing place, and the revolving pulley over which he could safely perform the cleaning process. There were other places on either side, and close to the upright plank, where one might stand with comparative safety and perform the operation.

There is evidence tending to show that, by reason of improper adjustment of valves intended for admitting steam into the cylinder, it had for some time before October 8, 1904, forced its way slightly into the cylinder and against the piston so as to move it and the rod connecting with the carriage, thereby giving the carriage what is called a "creeping, advancing motion," even when not desired or expected, and when the lever was locked in an upright position. Although denied by defendant's witnesses, there is evidence tending to show that such creeping motion had frequently occurred just before October 8th, during the time the mill was being speeded up before the hour of starting came. The decedent had been working for the lumber company for several months in the capacity of tail sawyer. He had frequently noticed this apparently automatic creeping motion of the carriage, had warned other workmen of it and had cautioned them to exercise care. A short time before October 8th he told witness Munn to watch the carriage, that he could not tell when it might start. Two or three days before that day he complained to defendant's superintendent about it and secured a promise that it should be repaired and put in order. On that day decedent went to his work as usual. After the speeding of the mill had begun and about 2 or 3 minutes before 7 o'clock he went to his place, back or south of the pulleys, took the stick, and cleaned the inside rim next to him. The evidence shows that the duties of his employment usually kept him on the south side of the pulleys, and did not require him to go to the north side except when a newly filed saw was to be substituted for a dull one, on which occasion only he was required by the terms of his employment to be on the north side to help the head sawyer make the change. But there is evidence tending to show that decedent frequently went over to the head sawyer's side and performed for him the service of cleaning the rim on that side.

On the morning in question, October 8, 1904, after cleaning the rim on his side, the head sawyer, not having gone to his lever, but standing some distance across the carriage track eastwardly thereof examining directions for the work of the day there posted, the decedent went over to the north side apparently to help the head sawyer. Instead of taking the position of absolute safety behind the upright guard plank, or either of the other positions of comparative safety a sufficient distance away from the carriage track, he took a position practically in front of the saw, within two feet of it, while it was running at the rate of 5,000 feet per minute, with his left foot on the west rail of the carriage track, and his right foot raised and resting upon

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a lower extension of the guard plank; and there with his back to the carriage that might at any time, as he knew, noiselessly start and bear down upon him, he stood holding the stick against the rim of the pulley in the process of cleaning it. While so doing, and without any backward look by him, the carriage did start, and, without observation by him, moved down upon him, forced his body against the teeth of the saw, and he was instantly killed.

At the close of all the evidence defendant's counsel moved for an instructed verdict in its favor. The motion was denied and exception duly allowed. A verdict and judgment followed in favor of the plaintiff, and this writ of error was prosecuted to secure a reversal of that judgment.

Thomas J. Davis (Theodore Hollister, on the brief), for plaintiff in error.

Charles Loring (Halvor Steenerson, on the brief), for defendant in error.

Before VAN DEVANTER and ADAMS, Circuit Judges, and PHILIPS, District Judge.

ADAMS, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The defendant was engaged in a hazardous business. It owed a duty to its employés to exercise all reasonable care to provide them with suitable and reasonably safe machinery and instrumentalities with which to do their work.

The evidence, we think, was sufficient to go to the jury on the issue of negligence as charged. It tended to show that defendant did not exercise reasonable care in keeping the log carriage well in hand or sufficiently under control during the preliminary period of speeding up its mill, to prevent its insidious and dangerous movement along the track where employés were likely to be. There was also substantial evidence tending to show that the decedent complained to the superintendent of defendant company about the dangerous condition of the machinery, and particularly about the sudden and uncontrolled movement of the log carriage, and secured a promise from him to repair the same. The last mentioned facts, unless the risk of remaining was so obviously and imminently dangerous that a person of ordinary prudence would not have taken it while the promised repairs were being made, warranted the decedent in continuing to work for the defendant for a time thereafter reasonably sufficient to enable it to make good the promise, without assuming the risks ordinarily incident to the use of known defective machinery (Hough v. Texas Pacific R. Co., 100 U. S. 213, 225, 25 L. Ed. 612; District of Columbia v. McElligott, 117 U. S. 621, 6 Sup. Ct. 884, 29 L. Ed. 946; Northern Pacific Railroad Co. v. Babcock, 154 U. S. 190, 200, 14 Sup. Ct. 978, 38 L. Ed. 958; Cudahy Packing Co. v. Skoumal, 60 C. C. A. 306, 125 Fed. 470, 473; Homestake Min. Co. v. Fullerton, 16 C. C. A. 545, 69 Fed. 923; Roccia v. Black Diamond Coal Min. Co., 57 C. C. A. 567, 121 Fed. 451); but they did not relieve him from the obligation to exercise reasonable care and precaution for his own safety while so continuing to perform the work.

Defenses predicated upon assumption of risk and contributory negligence are essentially different. Choctaw & Oklahoma, etc., R. R.

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Co. v. McDade, 191 U. S. 64, 68, 24 Sup. Ct. 24, 48 L. Ed. 96; St. Louis Cordage Co. v. Miller, 61 C. C. A. 477, 126 Fed. 495, 501, 63 L. R. A. 551; Narramore v. Cleveland C. C. & St. L. Ry. Co., 37 C. C. A. 499, 96 Fed. 298, 304, 48 L. R. A. 68; Cleveland C. C. & St. L. Ry. Co. v. Baker, 33 C. C. A. 468, 91 Fed. 224; Peirce v. Clavin, 27 C. C. A. 227, 82 Fed. 550, 553; Miner v. Connecticut River Railroad, 153 Mass. 398, 403, 26 N. E. 994. Therefore, notwithstanding the fact that decedent, by giving notice to defendant of the defective condition of its machinery and securing a promise of its reparation, might have escaped for some time the personal assumption of the risk ordinarily attendant upon continued service with such defective machinery, he might, and as will be presently seen, did not thereby relieve himself from the necessity of exercising reasonable care for his own safety in performing the service, or deprive the defendant of the defense of contributory negligence if he failed to do so.

In District of Columbia v. McElligott, supra, the Supreme Court, in commenting upon the care required of a person situated like the decedent, said:

> "If he exposed himself to dangers that were so threatening or obvious as likely to cause injury at any moment, he would, notwithstanding any promises or assurances of the district supervisor of the character alleged, be guilty of such contributory negligence as would defeat his claim for injuries so received."

In St. Louis Cordage Co. v. Miller, supra, this court, after announcing the general doctrine of assumption of risk in ordinary cases, and calling attention to the exception relieving an employé from its obligation after making complaint and securing a promise of reparation said:

> "Of course cases which fall under the exception are not governed by the rule, but the only defense remaining in such cases is that of contributory negligence."

And in Homestake Min. Co. v. Fullerton, supra, this court said the rule which permits an employé to recover in cases coming within the exception is subject to the proviso:

> "That the servant exercised due care and that the defect complained of did not render the machinery so imminently and immediately dangerous that he should have declined to use it at all until it was repaired."

See, also, 1 Labatt on Master & Servant, § 432.

In the light of the foregoing exposition of the law, we cannot agree with plaintiff's counsel that the complaint of defective machinery and the promise by defendant to repair it rendered it liable in this action—notwithstanding any negligence of the decedent. Such is not the law. He might have been relieved from the assumption of ordinary risks attendant upon the use of defective machinery, but he still remained under the obligation of exercising reasonable care for his own safety.

The rule defining reasonable care in any given case to be that care which ordinarily prudent persons commonly exercise *in like circumstances* is probably a sufficient generalization, provided emphasis is placed upon the last italicized words. The circumstances surrounding a person at the time of his injury naturally, as well as a matter

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of law, furnish an important consideration in determining whether due care is observed by him. When he has such knowledge of danger incident to the use of machinery as prompts him to complain to his master about it, and to require its repair as a condition for remaining longer in his service, such circumstances indicating imminent personal peril would most naturally suggest to an ordinarily prudent person the necessity for unusual care and watchfulness for his own safety. The triers of the fact should therefore take into consideration this naturally prudent instinct in determining whether on a given occasion one has exercised ordinary care as just defined. Labatt on Master & Servant, supra. It is a well-settled rule, recognized by the courts of the United States, that a question of law always arises at the close of the evidence in any case, whether there is any substantial proof warranting a verdict in favor of the plaintiff. In applying this rule, consideration most favorable to plaintiff must be given to all the evidence and reasonable inferences arising therefrom (Mt. Adams, etc., Ry. Co. v. Lowery, 20 C. C. A. 596, 74 Fed. 463); the undisputed evidence must be so conclusive (1) that all reasonable men in the exercise of an honest and impartial judgment can draw but one conclusion from it (Chicago, etc., Ry. Co. v. Price, 38 C. C. A. 239, 97 Fed. 423); and (2) that the court would in the exercise of sound judgment set aside a verdict returned in opposition to it (Railroad Co. v. Jones, 95 U. S. 439, 24 L. Ed. 506; Delaware, etc., Railroad v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; Elliott v. Chicago, Mil., etc., Railway, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068). The rule just announced is equally applicable when the issue of contributory negligence is involved. Elliott v. Chicago, Mil., etc., Railway, supra; Pyle v. Clark, 25 C. C. A. 190, 79 Fed. 744; Missouri Pacific Railway Co. v. Moseley, 6 C. C. A. 641, 57 Fed. 921; Claus v. Northern Steamship Co., 32 C. C. A. 282, 89 Fed. 646; Rich v. Chicago, Mil., etc., Railway (just decided by this court) 149 Fed. 79, 78 C. C. A. 663.

Tested by the rule just announced in any or all its phases, we entertain no doubt about the contributory negligence of the decedent in this case. Conceding to him the full right of going to the head sawyer's side of the pulleys, and conceding that it was his duty to clear that side of the rim of the upper pulley as well as his own, both of which are disputed by defendant, his method of doing the work according to the undisputed evidence was peculiar to himself. There is no substantial proof that any one else ever undertook to clean that side of the rim when standing as and where the decedent did. There is satisfactory proof that no head sawyer whose employment expressly comprehended that duty ever undertook to do it that way. Only one witness out of many who were examined testified that he had ever seen decedent do it in that way, and this witness said that it could have been done some other way, but that it appeared to be the easier way to do it by standing in the place where decedent stood. It must be borne in mind that the cleaning could not have been done when the saw was not in motion. The pulley necessarily had to revolve in order to clean the rim, and with its revolution the saw was also necessarily in motion, so that any proximity to the saw while cleaning the rim was potentially dangerous.

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The decedent was in the prime of early manhood, and possessed of unimpaired faculties of mind and body so far as the record discloses. He knew of the creeping tendency of the carriage, and was aware of its lurking danger and horrible consequence. He had only a few days before warned a fellow laborer of its liability to suddenly start and move upon the tracks toward the saw, and cautioned him to be careful. Only two or three days before, he had given notice to his employer that he could not continue in its service, if it did not put a stop to that dangerous action. With all this knowledge, at a time when the mill was speeding up and when alone the creeping motion could occur, and when, as known by him, it was liable to occur, he took his place on the track over which the carriage would necessarily move, in front of and close to the rapidly moving saw, and occupied himself intently with cleaning the rim of the pulley. He was in a place of imminent danger, in such circumstances, and with such knowledge of his peril as, under the rule requiring him to exercise the care which ordinarily prudent persons do under like circumstances, imperatively demanded immediate, constant, and anxious vigilance and watchfulness on his part. He exercised no vigilance at all. He could have detected the approach of the carriage by looking, but he did not. He paid no heed to the momentary possibility well known to him of the carriage moving down upon him, but stood there, back towards its approach. until about the moment it struck him, when, by its touch and a warning shout of one of his co-employés, he was aroused from his danger too late to save himself from the inevitable consequence. Tested by any expression of the rule governing the subject, found in text-books or adjudicated cases, the conduct of the decedent, as disclosed by uncontradicted and indisputable, proof, was so heedless of consequences, so hazardous and reckless as to clearly constitute contributory negligence on his part, and to warrant and require the court to say so as a matter of law.

Counsel for plaintiff ask us to say that, because of the promise to repair made two or three days before his death, the decedent had a right to assume that the machinery had, during those two or three days, been so repaired as to prevent the creeping motion of the carriage Such repairs probably would have involved a reconstruction of the valves leading into the cylinder, and possibly of the pipes leading from the boiler to the cylinder, and of the rod leading from the piston to the carriage, and any of these repairs probably would have required a general overhauling of the mill under and upon which the connections between the boiler and the carriage were located. It is inconceivable that this work could have been done without attracting general attention; but whether the repairs might have been made in two or three days or not is wide of the mark. Considering the imminent peril and danger of doing what the decedent did unless the repairs had been made, it was the height of recklessness to blindly assume without inquiry, and in face of the improbability of their being done without his knowledge, that they had been made, within the short period of time mentioned, and on such mere assumption to have incurred the great risk which he did.

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Again counsel contend that the decedent, being a short man, could not conveniently reach over the upright guard plank from which the head sawer always cleaned his side of the rim of the pulley. That may be so, but whether convenient or not he could have done it, and he could also have performed the act of cleaning while standing at the side of the plank, somewhat nearer to the revolving pulley. There was no special urgency on the morning when the casualty in question happened which required any impetuous, hasty, or unusually prompt action by the decedent. He had ample time to do the work before 7 o'clock. A place from which he could have performed his task in perfect safety was provided by defendant, and he was not justified from any considerations of personal convenience or otherwise in ignoring that provision and adopting the terribly dangerous method which he did. Morris v. Duluth, etc., Ry. Co., 47 C. C. A. 661, 108 Fed. 747; Gilbert v. Burlington, etc., Ry. Co., 63 C. C. A. 27, 128 Fed. 529.

After a careful consideration of all the evidence, and of all the propositions of law contended for by learned counsel for the plaintiff, we are constrained to say that contributory negligence was so apparent from all the evidence that the Circuit Court erred in not instructing the jury to find for the defendant. The judgment must be reversed, and the cause remanded, with instructions to grant a new trial; and it is so ordered.

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(149 Fed. 687.)

## CONEY ISLAND CO. v. DENNAN.

(Circuit Court of Appeals, Sixth Circuit. January 19, 1907.)

No. 1,568.

1. CARRIERS—ACTIONS FOR DEATH OF PASSENGER—QUESTIONS FOR JURY.

Defendant operated a passenger boat between the city of Cincinnati and a pleasure resort a few miles up the river. Passengers in going to and from the vessel at Cincinnati passed over a wharfboat, between which and the steamer there was a railed bridge three feet wide, and on the side of the steamer, where it rested, there was a space in the railing nine feet wide. Guards were usually stationed at such space on either side of the bridge to protect passengers going off the boat from stepping or falling off. Plaintiff's intestate, a boy 12 years old, with his mother, her sister, and two small children, returned on the boat late one evening with some 1,000 other passengers. There was much crowding at the bridge, and each of the women carried a child. In passing onto the bridge in some way plaintiff's intestate went to one side, and fell between the boats and was drowned. There was evidence tending to show that there were no guards stationed at the sides of the bridge. *Held*, that the question of defendant's negligence was one for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1315, 1319.]

2. WRIT OF ERROR—REVIEW OF INSTRUCTIONS—EXCEPTIONS.

An exception to a charge, in order to found a right to review, must be sufficiently distinct and specific to direct the attention of the court to the particular error which is the subject of complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1141; vol. 46, Trial, §§ 689–693.]

3. TRIAL—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE OF CHILD.

In an action to recover for the death of a boy 12 years old through the alleged negligence of defendant, a requested instruction, stating generally

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that plaintiff could not recover if the deceased failed to exercise reasonable care, was properly refused, where it did not explain or define what would constitute reasonable care in one of his age.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 489; vol. 37, Negligence, § 393.]

4. NEGLIGENCE—DEATH OF CHILD—CONTRIBUTORY NEGLIGENCE OF PARENT.

In an action by a mother to recover for the death of her son, 12 years old, by falling from a boat on which he was a passenger with her, through the alleged negligence of the defendant, which was operating the boat, an instruction that plaintiff was bound to exercise ordinary care for the safety of her son, and if she failed to do so, "and her failure in any way contributed" to her son's loss, she could not recover, was properly refused, as covering any negligence of plaintiff which may have contributed to her son's death however remotely.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 396. Imputed negligence, see Chicago, G. W. Ry. Co. v. Kowalski, 34 C. C. A. 4.]

In Error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

Chas. H. Stephens and Lawrence Maxwell, Jr., for plaintiff in error.
C. C. Benedict and J. Hartwell Cabbell, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This was an action brought by the administratrix of Clarence M. Henry to recover damages for wrongful negligence of the defendant, resulting in the death of the person whose representative she is. It is founded upon a statute of Ohio, giving a remedy in such cases for the benefit of the relatives of the deceased who have suffered pecuniary loss from the death.

The circumstances out of which the cause of action is supposed to have arisen are these: Coney Island is a pleasure resort a few miles up the Ohio river from the city of Cincinnati. The Coney Island Company is a corporation organized under the laws of West Virginia, and was in 1904 the owner of the Island Queen, a steamboat plying between the city and the resort during the summer months of that year for the carriage of passengers. At the landing at the city, for the purpose of embarking and discharging passengers, the company had a wharfboat, over which passengers passed from the landing to the steamer and from the steamer to the landing. On the afternoon of August 26, 1904, the deceased, who was a boy of about 12 years of age, with his mother and a sister of hers and two young children of the latter, took passage on the steamer from the city to the resort, and, after spending some time there, returned to the city on the last trip of the steamer for that evening. This was about half past 11 o'clock. The mother, her sister, and the children passed together from the steamboat toward the wharfboat. Both vessels at the passageway were much crowded. The mother was carrying one of the small children and her sister the other. The boy, Clarence, was by the side of his mother. Having difficulty in getting along in the crowd, his mother told Clarence that if he should get separated from her he should wait for her on the wharfboat. This was while they were nearing the wharfboat and moving slowly. In front or somewhat to one side of their course was

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the gangway or bridge for crossing from the steamer to the wharfboat. There was an opening in the railing around that side of the steamer of about nine feet, and in the middle of this was the bridge, about three feet wide, and having rails on each side to prevent people from falling off. This bridge was movable, and when in use rested partly on the steamer and partly on the wharfboat, and was intended to provide passageway from one vessel to the other. There was an open space of about three feet on each side of the bridge, extending to the post at the end of the railing. The vessels were near together, but there was an opening down between them of the width of from 7 to 20 or 24 inches, as estimated by different witnesses. Soon after the mother's direction to the boy, above stated, he got separated from his companions. He followed a lady who went over the opening at one side of the bridge, but in some way lost his footing, fell down through the opening, and was drowned. There was evidence tending to show that the crowd was dense about the gangway, moving in a mass. The sister of the boy's mother testified: "We had just to move with the crowd; we couldn't get one way or the other." More than 1,000 people, men, women, and children, were on the steamer. The boy was bright and capable beyond his years, but neither he nor his mother had ever been on a steamboat before. The evidence tended to show that the bridge was liable to get misplaced from the rocking and listing of the boats, and that the wide opening in the railing was to accommodate the changing relation of the boats, and that the company kept a guard of from two to four men around the bridge to keep it in position, and also to keep passengers from going over the openings at the sides of it. But there was also evidence that on this occasion either there were no guards there, or, if there were, they did not stop or warn passengers who crossed at the sides of the bridge. We have stated the case in this detail because of the contention that the court erred in not instructing the jury to find for the defendant. The jury found a verdict for the plaintiff, and assessed the damages at $4,000.

Counsel for the plaintiff in error submit four questions for our consideration on this review:

(1) Whether the court erred in refusing to give the peremptory instruction asked. (2) Whether the court erred in its instructions in stating the nature of the contributory negligence of the plaintiff which would bar the recovery. (3) Whether the court erred in refusing to charge the jury that, "if there was an open space between the boat and the wharfboat, which might have been seen by Clarence Henry if he had used reasonable care while leaving the boat, and you find that he walked or fell into such open space for want of reasonable care, the plaintiff cannot recover." (4) Did it err in refusing to instruct the jury that:

"The plaintiff, the mother of the deceased, was bound to exercise ordinary care under all the circumstances for the protection and safety of her son; and if she failed to do so, and her failure in any way contributed to her son's loss, then she cannot recover herein."

1. In view of the facts (those either not disputed or such as the jury might find from the evidence) we think there were grounds upon which

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the jury might conclude that the company was at fault in not providing more ample means for safely passing from the steamer to the wharfboat. There was a large crowd of passengers, many of them women and children, and the bridge was narrow. The boats were so near together as to tempt the unwary, the bridge being crowded, to pass over at the opening by the sides of it, and yet there was danger, as the sequel showed, that passengers might by a false step fall down through the opening. That there was danger of it, which the company itself appreciated, is shown by the fact that its practice was to station guards there, whose duty it was to see that passengers did not pass between the bridge and the end of the railing; but more especially, because the passage in that way was dangerous, and the company owed a duty to its passengers to maintain a guard there, to prevent accidents which were liable to happen from attempts to pass over the open space, and the evidence, as we have said, tended to show either that the guards were not stationed, or, if they were, they did not attend to their duty in this regard, and that the accident resulted from this fault. With respect to the contributory negligence charged by the defendant, we shall have more to say further on. We think it would have been palpable error for the court to have charged the jury that the evidence would not justify a finding that the defendant was negligent in the discharge of its duty to the deceased.

2. In his charge to the jury, the presiding judge, after referring to the circumstances of the accident, and coming to the subject of the contributory negligence of the boy, wherewith he was charged by the defendant, said:

"In view of all these conditions that I have attempted hastily to sketch, and which you must carry in your minds, did that boy, at that time, know and appreciate the danger, if he attempted to step from the boat over to the wharfboat, of falling into the river? Do the conditions presented require or justify that conclusion? If he, for the sake of getting over to the wharfboat ahead of the great body of people on board who were pushing over the bridge, took the risk, then it was his own negligence that caused him to fall into the river; but if he did not appreciate it, if because of his age he did not understand and did not appreciate the danger, but believed that he could pass in safety, that he might follow the woman who was passing over, and he was not advised to the contrary, then you would not be warranted in saying that he assumed the risk, or that he was negligent in following the woman over to the wharfboat in that way—the woman who preceded him."

And in varying forms of expression this instruction was several times repeated in the course of the charge. The complaint made of this instruction is that it supplied a wrong test of the negligence of the boy, and that the court, instead of instructing the jury that his negligence depended upon his actual appreciation of the danger, should have told them that it depended upon the appreciation which he ought to have had of the danger, because it is said his lack of appreciation may have arisen from his carelessness and inattention and the failure to exercise the faculties he possessed. But we think the criticism is too sharp, and does not fairly interpret the language of the court. In the circumstances of the case the jury were compelled to judge of the boy's knowledge of the danger by the test of probability. Taken altogether, the instruction of the court was that, if the boy had the means

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of knowing the danger, and chose that way instead of going by the bridge, he was negligent. "Knowing the danger," said the court, "fully appreciating it, did he deliberately choose that way, with all the risks it involved, rather than the way over the bridge?" It may be admitted that the boy, if he was not pressed on by the crowd and had freedom of action, and so was given a choice, was bound to exercise the faculties he possessed, and whether he did this in a reasonable way was to be determined from all the circumstances. Deliberately choosing necessarily implies the exercise of the faculties of the boy upon the knowledge which he possessed. In the case of Klatt v. Foster Lumber Co., 92 Wis. 622, 66 N. W. 791, which is cited for the plaintiff in error, the court stated the grounds of the rule which is invoked as follows:

"The exercise of ordinary care includes the fair use of one's faculties and opportunities of observation, in order to learn and comprehend the dangers which are naturally incident to the situation."

This as a general statement is undoubtedly correct. But it has more reasonable application to a case where the injured party is an adult, and has had previous opportunity for learning the dangers of the situation. It has, however, a much feebler influence when the injured person is a mere youth without experience, brought into peril on the instant without previous opportunity for observation; for how could there be a duty to remember what he had never known, or to act upon an apprehension of danger which he did not at the time understand? But, whatever may be said of the technical merit of the distinction adverted to in its application to the facts of this case, other considerations incline us to overrule this assignment of error. Notwithstanding the fact that the court repeatedly gave its instruction upon this point in the language stated, its attention was at no time called to the modification which the counsel now insist should have been made. At the close of the charge the court said to the jury:

"I want to say to you, gentlemen, that if Clarence Henry knew and appreciated the danger in attempting to step over onto the wharfboat, he was guilty of negligence that would deprive the plaintiff of the right to recover."

Counsel for the defendant said: "We cannot hear, your honor." Whereupon the court rejoined:

"I will repeat, for the benefit of counsel, that if Clarence Henry knew and appreciated the danger of attempting to pass over from this open space to the right of the bridge, onto the wharfboat, he was guilty of negligence, and it would be no excuse that the woman in front of him was using that way in passing over; he could not justify his action by following the woman in front, or anybody else."

The counsel, without any suggestion of the error now complained of, filed eight exceptions to the charge, of which one was to so much of it as related to the subject of contributory negligence, reciting brief parts of it, but not indicating any ground on which the exception was rested. Nor was there any disclosure of the point now raised in the motion for a new trial, though from the opinion of the court it would seem that it was raised at the hearing of the motion. We must therefore suppose that the counsel did not at the trial intend to present or have in mind the distinction between actual knowledge and the obliga-

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tion to act upon it, and that it was developed upon subsequent examination of the record. In that case, error could not be assigned upon the instruction, though faulty. Counsel were bound to present their point at the trial, so that the court might consider it, and cannot, under a broad exception not aimed at it, upon subsequent search for error and finding it, bring it forward as a ground for reversing the judgment. It is a well-settled rule that an exception, in order to found a right to review, must be sufficiently distinct to direct the attention of the court to the particular error which is the subject of complaint. A challenge which is aimless, and points to nothing in particular, either in what is expressed or omitted, does not perform the object of an exception. And it is equally well established that when without special request the court gives an instruction which is in the main correct, but requires some modification or addition to make it quite so, it is the duty of counsel for the party whose interest requires the modification to ask for it or challenge the instruction because of the defect, and if they fail to do this they are deemed to be content with it. This assignment of error is also overruled.

3. The third request of the defendant for instructions was this:

"If there was an open space between the boat and the wharfboat, which might have been seen by Clarence Henry if he had used reasonable care while leaving the boat, and you find that he walked or fell into such open space for want of reasonable care, the plaintiff cannot recover."

Unless a request for instructions is entirely correct, and may properly be given without qualification or liability to be misunderstood, there is no error in refusing it. Brooks v. Marbury, 11 Wheat. 78, 6 L. Ed. 423. While, perhaps, this instruction might in general be applicable to the case of an adult, it would need to be accompanied by an explanation of what due care is in the case of a young and inexperienced person. What care does this request imply was required of him? Was it care in attempting to cross at the opening, or was it care in crossing? It should have specified, so as to direct the jury to the point of its application. Besides, we think that, although this instruction was not given in the language or form in which it was expressed, the court did in substance state this rule, explained as it should be by reference to the youth and inexperience of the boy. If, in the language of the court, he attempted to cross at the opening because from his youth and inexperience he did not understand and appreciate the danger, he was not guilty of that want of due care which would bar the action.

4. It is also assigned as error that the court erred in not giving the sixth instruction requested by the defendant. It was as follows:

"The plaintiff, the mother of the deceased, was bound to exercise ordinary care under all circumstances for the protection and safety of her son, and if she failed to do so, and her failure in any way contributed to her son's loss, then she cannot recover herein."

It would seem that the court overlooked the averment of negligence on the part of the mother contained in the answer, for in stating the issues in the charge to the jury, after referring to the denial of negligence on the part of the defendant, the court goes on to say: "Defend-

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ant further says that if he did fall from the 'Island Queen' and was drowned, it was because of his own negligence, and not the negligence of the defendant," and makes no mention of a charge of negligence on the part of the mother; and the record leaves open the possibility that the court declined this instruction because it was not supposed to be in issue. If such an inadvertence was seen, it was the duty of counsel to correct it. But it may not have been noticed, and we shall not dispose of the question on that ground. The Supreme Court of Ohio, in Wolfe v. Railway Co., 55 Ohio St. 517, 45 N. E. 708, 36 L. R. A. 812, held that, in the trial of a case arising under the Ohio statute—

"the contributory negligence of the beneficiaries, who are to receive the damages, and for whose benefit the action is brought in the name of the administrator, is clearly a defense to the action, available to the person or corporation causing the injury."

Admitting, for the present purpose, that this was in such sense a construction of the statute as the federal court is required to follow, a question arises whether the defense stated by the answer that, after denying its own fault, the death of the deceased "was caused solely by his own carelessness and that of his mother," would support a defense rested upon the contributory negligence of the mother—a defense which implies co-operative negligence on the part of both parties. We have some doubt upon this question (as to which see 5 Encl. Pl. & Prac. 11, 12 and Watkinds v. South. Pac. R. Co. [D. C.] 38 Fed. 711, 4 L. R. A. 239), but prefer to rest our decision upon the ground that the request was not of itself a proper one to be given. The court is asked to say that, if the mother failed to use ordinary care for her son, and the failure in any way contributed to his loss, she could not recover; but this would not be so unless her failure to use due care contributed proximately to his loss. Any remote failure to exercise care for him, as, for instance, taking him along with her on that trip, would not bar the action. 7 A. & E. Encyc. of Law (2d Ed.) 380. Besides, if this instruction was intended to include negligence in taking the boy with her, it is to be observed that the evidence leaves no room for doubt that the company received and carried men, women, and children indiscriminately. It was therefore in no position to complain if the latter were brought along. But probably the instruction requested was intended to apply to the care the mother gave the boy while they were passing along just before the accident, and we think there was no evidence which fairly justified a finding that she was guilty of negligence. The evidence leaves no doubt that the steamboat was much crowded. The only witnesses who testified to the immediate facts were Mrs. Dunham, the mother's sister, and the mother herself. The former testified that the mother said to the boy, "Clarence, you stay right by mamma, for fear you will get lost in the crowd," and "told him if he got separated, to wait for us on the wharfboat"; and the latter testified that she "told him to catch hold of my dress, so that we wouldn't get separated." She was carrying the little child of her sister in her arms, and they had no reason whatever to apprehend such a danger as confronted them. The only apprehension they had was that they would get separated, and for this they made provision.

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In these circumstances we think there was no reasonable ground for imputing negligence to the mother. The conditions were all of the defendant's creating, and she did the best she could in the circumstances in which she was placed.

We are entirely satisfied that the verdict and judgment were right, and we find no sufficient reason for disturbing the result. The judgment will be affirmed, with costs.

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(149 Fed. 694.)

## MILLER et al. v. MARGERIE.

(Circuit Court of Appeals, Ninth Circuit. January 7, 1907.)

No. 1,311.

1. PUBLIC LANDS—ALASKA TOWN SITES—DECISION OF TRUSTEE—CONCLUSIVENESS.

Under Act Cong. March 3, 1891, c. 561, 26 Stat. 1099 [U. S. Comp. St. 1901, p. 1467], providing for the disposition of town site lots in Alaska, and authorizing the trial of conflicting claims before the trustee on notice with an appeal to the Commissioner of the General Land Office, and from his decision to the Secretary of the Interior, the decision of the trustee is final, in the absence of fraud, accident, or mistake, with reference to all questions of fact arising in such proceeding, except as the same may be reversed by the Commissioner of the General Land Office or the Secretary of the Interior.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 98.]

2. SAME—FRAUD—EQUITABLE RELIEF.

In a suit to set aside a deed by an Alaska town site trustee for fraud, the fact that the proceeding in which defendant obtained the legal title to the lot in controversy was ex parte, was not of itself sufficient ground to justify a court of equity in entering on an inquiry as to the truth or falsity of the evidence on which the trustee acted in confirming defendant's claim to the property; but it was incumbent on complainants to allege facts showing that, without negligence on their part, they were prevented by fraud or accident from appearing before the trustee and submitting evidence to establish their right to enter the property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, §§ 341, 342.]

3. SAME—PLEADING.

In a suit to set aside a deed of an Alaska town site trustee for fraud, it was not sufficient to allege generally that complainants did not have knowledge of the hearing before the trustee or an opportunity to prove that the representations made by defendant to the trustee in obtaining the legal title to the property were false, but the bill must also state the particular facts and circumstances which prevented complainants from having notice of the proceeding and an opportunity to protect their rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, §§ 341, 342.]

Appeal from the District Court of the United States for the District of Alaska.

E. M. Barnes, for appellants.

Malony & Cobb, for appellee.

Before GILBERT and MORROW, Circuit Judges, and DE HAVEN, District Judge.

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DE HAVEN, District Judge. This is an equitable action in which the complainants ask for a decree declaring void a certain deed by which the defendant acquired the legal title to lot 4, in block B, in the town of Juneau, Alaska. The bill of complaint also prays for general relief. The deed was executed to defendant by the trustee of the town site of Juneau under section 11 of the act of Congress approved March 3, 1891, entitled "An act to repeal timber-culture laws, and for other purposes." Act March 3, 1891, c. 561, 26 Stat. 1099 [U. S. Comp. St. 1901, p. 1467]. The bill of complaint alleges that a trustee of the town site of Juneau was duly appointed, under the statute above referred to, and "that at all times since 1885, plaintiffs and their grantors have been and now are (the paramount title of the United States alone intervening) the owners of and in the actual and exclusive possession of, until hereinafter named, and at all times since said year 1885, have been, and now are entitled to the immediate and exclusive possession of lot 4, block B, of the town of Juneau, district of Alaska"; that the defendant "on the ——— day of May, 1903, falsely and fraudulently, and with intent to impose upon said trustee," represented to him "that he, the defendant, and his grantors, were the owners of and in possession of, and entitled to the possession of, said lot on the 13th day of October, 1893, ever since had been, and then were such owners, and were at all times in the possession of said lot, and at all times entitled to the possession of said lot; that said trustee did, on the ——— day of May, 1903, at his office in Juneau, Alaska, actually hear, and determine on said false statements as aforesaid, the said questions of said occupancy and ownership of said lot," and, acting under the belief that such statements were true, executed to the defendant a deed conveying to him the legal title to the lot in controversy. The bill then alleges:

"That plaintiffs nor either of them had any knowledge of said hearing or any opportunity to learn of said hearing or any opportunity to deny said false statements or any part thereof, or to prove said statements or any part thereof false, at any time or place."

The defendant interposed a demurrer to the bill upon the ground that "the same does not state facts sufficient to constitute a cause of action, in this: there are no allegations of fact showing how, or the means whereby, the plaintiffs were prevented from having knowledge of the hearing before the town site trustee, and there litigating the right of possession of the lot sued for, nor is it shown that such want of knowledge, or any want of opportunity to be heard before said town site trustee was induced or caused by the defendant." The District Court sustained the demurrer, and the plaintiffs, having declined to amend, thereupon rendered its judgment dismissing the action. The complainants appeal, and the ruling of the court sustaining the demurrer is assigned as error.

1. Section 11, of the act of March 3, 1891, entitled "An act to repeal timber-culture laws, and for other purposes" (chapter 561, 26 Stat. 1099 [U. S. Comp. St. 1901, p. 1467]), provides:

"That until otherwise ordered by Congress lands in Alaska may be entered for town-site purposes, for the several use and benefit of occupants of such

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town sites, by such trustee or trustees as may be named by the Secretary of the Interior for that purpose, such entries to be made under the provisions of section twenty-three hundred and eighty-seven of the Revised Statutes as near as may be; and when such entries shall have been made the Secretary of the Interior shall provide by regulation for the proper execution of the trust in favor of the inhabitants of the town site. * * *"

Acting under the authority conferred by this section, the Secretary of the Interior on June 3, 1891, made certain regulations providing for the entry of town sites and the disposition of lots thereon for the benefit of the occupants thereof. 12 Land Decisions, 583. These regulations provide for the entry of the town sites and the actual survey of the same into lots, blocks, streets, and alleys, and the filing of the plats of the survey in the General Land Office. The plats were required to show what lots were occupied, and the names of the owners, the designation of the owner of any lot not, however to be "taken or held as in any sense or to any degree a conclusion or judgment by the trustee as to the true ownership in any contested case coming before him." Paragraphs 28 and 29 of said regulations further provide:

"28. As soon as said plats are completed, the trustee will then cause to be posted in three conspicuous places in the town, a notice to the effect that such survey and platting have been completed and notifying all persons concerned or interested in such town site that on a designated day he will proceed to set off to the persons entitled to the same, according to their respective interests, the lots, blocks, or grounds to which each occupant thereof shall be entitled under the provisions of said act. Such notices shall be posted at least fifteen days prior to the day set apart by the trustee for making such division and allotment. Proof of such notification shall be evidenced by the affidavit of the trustee, accompanied by a copy of such notice.

"29. After such notice shall have been duly given, the trustee will proceed on the designated day, except in contested cases which shall be disposed of in the manner hereinafter provided, to set apart to the persons entitled to receive the same the lots, blocks and grounds to which such persons, company or association of persons shall be entitled, according to their respective interests," etc.

After providing for the manner in which lots, in relation to which there is no controversy, shall be set apart to the persons entitled thereto, paragraph 31 of the regulations provides that the trustee shall, "where he finds two or more inhabitants claiming the same lot, block, or parcel of land, proceed to hear and determine the controversy, fixing a time and place for the hearing of the respective claims of the interested parties, giving each ten days' notice thereof, and a fair opportunity to present their interests in accordance with the principles of law and equity applicable to the case, observing as far as practicable the rules prescribed for contests before registers and receivers of the local offices. * * * If the notice herein provided cannot be personally served upon the party therein named within three days from its date, such service may be made by a printed notice published for ten days in a newspaper in the town in which the lot to be affected thereby is situated; or, if there is none published in such town, then said notice may be printed in any newspaper published in the territory." The regulations also gave to any party aggrieved by the decision of the trustee the right to appeal to the Commissioner of the General Land Office, and, if dissatisfied with his decision, to still further prosecute

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an appeal to the Secretary of the Interior. Under the law and the regulations of the Secretary of the Interior above set forth, persons claiming the right to obtain from the United States the legal title to lots in the town of Juneau were required to make application therefor to the trustee of the town site, and he was clothed with the authority to investigate and determine the rights of all persons making such applications, and his action thereon has the same legal effect as that of the register and receiver in passing upon a claim of right to enter public land under the homestead or pre-emption laws; that is, in the absence of fraud, accident, or mistake, his decision of all questions of fact arising in such a proceeding was final, except as the same might be reversed upon appeal to the Commissioner of the General Land Office and the Secretary of the Interior. This rule in relation to the effect of the decisions of the officers of the Land Department in disposing of public lands of the United States is well settled. Johnson v. Towsley, 13 Wall. 72, 20 L. Ed. 485; Shepley v. Cowan, 91 U. S. 330, 23 L. Ed. 424; Lee v. Johnson, 116 U. S. 50, 6 Sup. Ct. 249, 29 L. Ed. 570; Sanford v. Sanford, 139 U. S. 642, 11 Sup. Ct. 666, 35 L. Ed. 290; Durango Land & Coal Co. v. Evans, 80 Fed. 425, 25 C. C. A. 523. Thus in Sanford v. Sanford, 139 U. S. 642, 11 Sup. Ct. 666, 35 L. Ed. 290, the court, after stating that a court of equity will not interfere with the rightful exercise of the powers intrusted to the officers of the Land Department in matters properly before them, or review their findings of fact, "for alleged errors in passing upon the weight of evidence presented," proceeded to say:

"But where the matters determined are not properly before the department, or its conclusions have been reached from a misconstruction, by its officers, of the law applicable to the cases before it, and it has thus denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting its judgment, then the courts can, in a proper proceeding, interfere and control its determination so as to secure the just rights of parties injuriously affected. Quinby v. Conlan, 104 U. S. 420, 426, 26 L. Ed. 800; Baldwin v. Starks, 107 U. S. 463, 465, 2 Sup. Ct. 473, 27 L. Ed. 526. In such cases a court of equity only exercises its ordinary jurisdiction to prevent injustice from misconstruction of the laws or the machinations of fraud. * * * And the misrepresentations and fraud mentioned necessarily affecting the judgment of the department must be such as have prevented the unsuccessful party from fully presenting his case or the officers of the government from fully considering it, such as have imposed upon its jurisdiction or turned its attention from the real controversy."

It is true that in the case from which the foregoing quotation is made, and in all of the cases above cited, the controversy was between parties who had actually appeared before the land officers and submitted evidence in support of their respective claims, but these facts do not affect the principle upon which they were decided, or render inapplicable to the cause before us the rule which they declare, namely, that the decision of the officers of the Land Department in the matter of a claim of right to enter public land of the United States, which was regularly and properly before them, cannot be set aside, except upon some one of the grounds upon which courts of equity proceed in adjudging void the judgment or decree of a court. The principle upon which courts of equity proceed in such cases is thus stated by Chief



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Justice Marshall, in Marine Ins. Co. v. Hodgson, 7 Cranch, 332, 3 L. Ed. 362:

"Any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery."

See, also, Crim v. Handley, 94 U. S. 652, 24 L. Ed. 216; Dunlap v. Steere, 92 Cal. 344, 28 Pac. 563, 16 L. R. A. 361, 27 Am. St. Rep. 143; Railroad Co. v. Neal, 1 Woods, 353, Fed. Cas. No. 11,534; Brooks v. O'Hara (C. C.) 8 Fed. 529.

The fact that the proceeding in which defendant obtained the legal title to the lot in controversy was ex parte is not of itself sufficient ground to justify a court of equity in entering upon an inquiry as to the truth or falsity of the evidence upon which the trustee acted in confirming the defendant's claim to such lot, but under the doctrine of the cases just cited it was incumbent upon the complainants to allege in their bill facts showing that without negligence upon their part they were prevented by fraud or by accident from appearing before the trustee of the town site of Juneau, and there submitting evidence to establish their right to enter the lot now claimed by them. There is no allegation in the bill that the trustee failed to give the notice required by the regulations of the Secretary of the Interior, or, if such notice was given, that the failure of the complainants to be informed thereof and to appear before the trustee with their proofs was the result of fraudulent conduct upon the part of the defendant, or of some accidental cause which would be recognized by a court of equity as sufficient ground upon which to hold that they ought not to be concluded by the action of the trustee in conveying the lot in controversy to defendant. The demurrer directed specific attention to these defects in the bill, and was properly sustained. It is not sufficient to allege generally that the complainants did not have knowledge of the hearing before the trustee, or opportunity to prove that the representations made by the defendant to the trustee in obtaining the legal title to the lot described in the bill were false, but the particular facts and circumstances which prevented them from having notice of the proceeding, and opportunity to protect their rights, should be set out in the bill, so as to enable the court to determine from the facts so alleged whether the complainants show themselves to have been prevented by fraud or accident from appearing before the trustee and establishing their right to acquire title to the lot which is the subject of controversy in this action.

Decree affirmed.

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(149 Fed. 698.)

## UNION RY. CO. v. STANDARD WHEEL CO.

(Circuit Court of Appeals, Sixth Circuit. December 4, 1906.)

No. 1,572.

EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—DISMISSAL—TIME.

Shannon's Tenn. Code, relating to condemnation proceedings, provides for a preliminary inquest by a jury, who, if they find for the petitioner, assess the damages sustained and report to the court, whereupon sec-

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tion 1859 declares that, if no objections are made, the report shall be confirmed and the land decreed to the petitioner on payment of the damages assessed, with costs. Section 1861 gives to either party the right to appeal and have his case tried anew before a jury, and section 1863 declares that an appeal does not suspend the operations of the petitioner on the land, provided he give bond with security, etc. Section 1865 provides that the petitioner shall not enter on the land until the damages assessed and the costs have been actually paid, or, if an appeal has been taken, until a bond has been given to abide the final judgment. *Held* that, where judgment has been entered assessing the damages for land sought to be condemned for a railway right of way on the trial of an appeal taken under section 1863, the petitioner was not thereafter entitled at its election to dismiss the proceeding as to a portion of the land sought to be condemned merely because in its opinion the damages assessed were too high.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 649.]

In Error to the Circuit Court of the United States for the Western District of Tennessee.

McFarland & Canada, for plaintiff in error.

W. A. Percy and M. C. Ketchum, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. The Union Railway Company, a Tennessee corporation, filed a petition in the circuit court of Shelby county in that state against the Standard Wheel Company, a corporation of Indiana, holding a lease of a certain tract of land on Raleigh street in the city of Memphis, for the condemnation of a portion of the leased land for the purposes of its railway. The wheel company removed the cause into the Circuit Court of the United States and there contested the proceeding. A jury of view was summoned, who reported their assessment of damages of the defendant at the sum of $2,587.50. Under a privilege given by the statute of Tennessee both parties appealed, and demanded a jury, for a trial in the common way of trial of causes in the court. At this stage of the cause the petitioner, by leave of the court, amended its petition by including a strip adjacent to the other. We are to infer that a jury of view was not summoned in respect to the new strip, as no proceeding of that kind is shown by the record. In the proceedings in the cause a distinction of the two parcels was maintained to the end, the verdict and judgment being separate as to each; that is to say, they show what sum was assessed and adjudged as damages for each. At the trial the jury assessed the wheel company's damages for the taking of the first-mentioned portion of the land at $4,000 and for the other at $6,566.40. A judgment was entered for the amount of these two sums. The railway company moved for a new trial upon several grounds, among them that the damages were excessive. The court overruled all the other grounds, but held that the damages were excessive, and required the wheel company to remit $500 from the verdict for the first tract and $2,500 of the verdict from the other. This being done, the judgment was amended and reentered. By this judgment it was by the court "ordered, adjudged and decreed that the defendant, the Standard Wheel Company, do have and recover of the petitioner, the Union Railway Company, as damages.

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for the taking of the thirty-four foot strip [which was the parcel brought in by the amendment of the petition] * * * three thousand, eight hundred and eighty-four and 30-100 dollars," that being the amount of the verdict, less the remittitur, with interest. In the same entry there was included a judgment for the damages in respect of the other parcel, and in the final statement of the amount of the recovery the sums allowed for each were added and judgment was rendered for the aggregate sum, and execution was awarded for the whole amount. And it was by the judgment further ordered that upon the payment of the damages so determined the right, title, and interest of the defendant in the easement thus condemned should be divested out of the wheel company, and the petitioner be put in possession. Thereupon the petitioner asked leave to dismiss its amended petition and abandon its proceedings thereon, and that the judgment be vacated so far as it goes against it for the taking of the land brought in by the amendment. The ground on which the motion was made was not stated. The motion was overruled and the petitioner excepted. The error assigned is in this ruling.

The statute of Tennessee relating to this subject provides for a preliminary inquest by a jury, who, if they find for the petitioner, assess the damages sustained by the defendants. They report to the court Thereupon it is provided by section 1859 of the Code (Shannon's Code) that:

"If no objection is made to the report, it is confirmed by the court, and the land decreed to the petitioner, upon payment to the defendants, or to the clerk for their use, of the damages assessed, with costs."

Section 1861 gives to either party the right to appeal from the finding of the jury and have his cause tried anew before a jury in the common manner of the trial of causes. Section 1863 is as follows:

"The taking of an appeal does not suspend the operations of the petitioner on the land, provided such petitioner will give bond with good security, to be approved by the clerk, in double the amount of the assessment of the jury of inquest, payable to the defendants, and conditioned to abide by and perform the final judgment in the premises."

Section 1864 authorizes a preliminary survey by the petitioner. But section 1865 provides that:

"No person or company shall, however, enter upon such land for the purpose of actually occupying the right of way, until the damages assessed by the jury of inquest and the costs have been actually paid; or, if an appeal has been taken, until the bond has been given to abide by the final judgment as before provided."

The question which we are required to determine is whether at the time when the petitioner asked leave to dismiss its amended petition, and that the judgment so far as it related to the new parcel brought in by the amendment be vacated, it had that right. The authorities quite generally recognize that the right to discontinue such proceedings at some stage of their progress exists; but there is a great divergence of opinion as to the time when the right ceases. The principal difference is in the holding that the right is ended by a final judgment fixing the damages and entitling the petitioner to take possession on

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payment of them, and the holding that the right continues until he elects to take the property at the value fixed by the judgment. It would be a tedious task to canvass the great number of cases upon this subject which the industry of counsel has collected in their briefs. Many of them will be found upon examination to have turned upon the particular language of the statutes under which the proceedings were taken. But many others were decided upon general principles of justice and expediency. In the absence of any statutory provision leading to one conclusion or the other, we should be much inclined to think that the weight of reason and analogy would require that when the amount of damages to be paid the respondent has been adjudged upon a trial, and the right is adjudged to the petitioner to take the property upon payment of the damages, the obligations of the parties should be regarded as fixed. When such a proceeding is carried forward to a trial before a court and jury in the ordinary course of causes between party and party, it becomes subject to all the rules and incidents of such causes. It was because of such characteristics that the Supreme Court held in Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206, that the Circuit Courts of the United States might take jurisdiction and adjudicate the case in the same manner as in ordinary civil actions. We cannot think that the condition stated in the judgment that the damages shall be first paid is of much importance in settling the question we are considering. It results from a constitutional requirement that it should be so. It is the order required by the nature of the proceeding. Besides, an adjudication that a man have a right to a beneficial privilege upon his performing some condition, and adjudging also that he perform the condition, is no strange thing in jurisprudence. There may be cases where, subsequent to the judgment, it appears that the petitioner cannot, for reasons beyond its control, obtain or use the benefit of the judgment, as by disclosure of lack of title in the defendant, or the loss or cessation of power to use the property, the court on these facts being shown will relieve the petitioner and excuse it from compliance with the judgment. But this must be upon sufficient reasons, of which the court will judge. It is not a sufficient reason that the petitioner is dissatisfied with the price it is required to pay. Mutuality of obligation between parties to a judgment is a principle in its foundation. In such a proceeding as the present the judgment binds the defendant. He has no choice but to surrender the property at the price which is determined by the contest he has been compelled to make. If the other party is free, nothing has been gained by the defendant. He may be pursued again and again until at last the other party has got a jury to fix a price which will be satisfactory to him. The result of the abandonment is to leave things as they were at the beginning; and we are aware of no rule of law which would prevent the party from proceeding anew as in the ordinary case of voluntary dismissal or nonsuit. When a party undertakes to subject another's property to his own use, he must be deemed to be willing and intend to pay a fair price for it, and that such fair price shall be fixed by the verdict of a jury to be approved by the court. Good faith requires that he shall not use the power of the court to

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vex the other party with successive experiments in the effort to get what he wants at his own price. And the public has an interest in the finality of the judgment. It will endure one litigation between parties, but not a repetition of it, to give one of them a chance to get a better result. The statute of Tennessee, whose laws we are required to administer, confirms these views in their application to the present case. By section 1863 of the Code, above cited, the petitioner may take possession of the land on the coming in of the verdict of "the jury of inquest" by giving bond "conditioned to abide by and perform the final judgment in the premises." It is true that in this case the report of a jury of inquest was waived, and the petitioner did not take possession. But this does not affect the construction of the statute, which plainly contemplates that the final judgment is to be binding upon the petitioner, and the final judgment fixes the price he is to pay. On the appeal the cause is to be tried as a cause between party and party. The jury is to assess the damages. The court is to render judgment. The defendant is bound by it, and so is the petitioner, on principle as we think, but also by force of the statute.

We are referred to no decision of the Supreme Court of Tennessee directly in point upon the construction of this statute as it affects the case in hand or upon the general principles applicable to the subject. The cases which are thought most nearly so are White v. N. & N. W. R. Co., 7 Heisk. (Tenn.) 518, and Stephens v. Duck River Nav. Co., 1 Sneed (Tenn.) 237. In the former case the railroad company had taken possession of White's land. In a suit brought by him to recover damages he obtained a judgment. Execution therein was returned nulla bona. He then brought suit to enjoin the use of the land until his damages were paid. And the court sustained him, holding that the title had not passed, and would not until the owner was compensated. The court said:

"The most that can be claimed by the appropriation is an inchoate right that may ripen into a perfect title upon the payment of the price."

Nothing was adjudged or said that is here disputed. In the case of Stephens v. Duck River Nav. Co., upon the return of the verdict of the jury assessing the damages and before the entry of the judgment, the petitioner moved to quash the proceedings for the reasons, among others, that the object for which the navigation company was organized had become impracticable and the company had abandoned the project, and, further, that a bill had been filed for its dissolution. The motion was resisted upon the ground that the defendant had acquired by the verdict of the jury a right to the damages assessed. But the Supreme Court held otherwise, and said:

"We cannot assent to this reasoning. On the contrary, we think that an utter abandonment of the contemplated scheme of improvement in good faith, at any time before the final judgment of the court upon the report of the jury, would take away the right of the party to insist upon the value of his property, and transfer of the title to the company, and leave him to recover such damages, under all the circumstances of the case, as he may have sustained by the erection of a dam during its continuance. Of course, in such case, the abandonment of the enterprise, and total removal of the cause of injury must be established by plenary evidence, and the evidence of abandonment must be of a character to be, in law, binding and conclusive upon the company."

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The right to abandon the proceeding after final judgment was not in issue, and was not decided. But the facts were such as to challenge the attention of the court to the time to which the right to abandon continued, and it may well be thought that the language of the court, stating that in certain circumstances a dismissal might be allowed "at any time before the final judgment of the court upon the report of the jury," was used deliberately. The court in which the trial is to be had is one of general jurisdiction in respect to the relief it may render. In this case it rendered a judgment that the defendant recover the damages found and awarded execution, which, as we are inclined to think, though we do not decide, was a proper exercise of its authority. At all events, it was a judgment which it had power to render, and, if it erred in its exercise, the remedy was to take measures for its reversal. The petitioner, however, took the ground that it had the privilege to disregard it altogether and to demand that the court vacate the whole proceeding on its amended petition. The case of Baltimore & Susquehanna R. Co. v. Nesbit, 10 How. 395, 13 L. Ed. 469, is cited by counsel for the petitioner as an authority for the proposition that it had the right to withdraw from the proceeding at any time before it should pay the damages and take possession. In that case, Mr. Justice Daniel made use of some language, arguendo, from which, if we did not regard the statute of Maryland, such an opinion could fairly be deduced. But the case arose under a statute which did not contemplate a trial and the judgment was rendered upon an inquisition. Besides, there was no affirmative judgment in favor of the defendant that he recover the damages. The petitioner did not tender the damages, and five years after the Legislature passed an act requiring the court to set the judgment aside and direct a new inquisition as if it had itself set the verdict aside and ordered a new inquisition. The court set aside the judgment, but the petitioner did not ask for a new inquest. On the contrary, claiming that the act of the Legislature was void, the railroad company, seven years after the judgment, tendered the amount thereof, with interest. The question before the court was whether the act of the Legislature directing the vacation of the judgment was void for the reason that it impaired the obligation of the contract which it claimed to have with the state by reason of its charter in which it was given the power of eminent domain. It seems a singular contention, but it is enough to say that it did not claim to have a contract with the owner of the land. The court held the act was a valid exercise of power, that the railroad company had no contract with the state which prevented it from providing that there should be another inquisition for the damages, assuming even that the petitioner had not lost its right by its long delay in following up the judgment by tendering the damages, which the court did not admit. From this examination of the case it is apparent that it decides nothing in conflict with the views we have expressed. The radical difference between an inquest and a trial would be of itself sufficient to distinguish it.

We think the court did not err in denying the motion; and its order is affirmed, with costs.

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(148 Fed. 1022.)

## UNITED STATES v. WALKER.

(Circuit Court of Appeals, Sixth Circuit. November 8, 1906.)

No. 1,511.

1. UNITED STATES—SUITS AGAINST—LIMITATION.

The limitation contained in Act March 3, 1887, c. 359, § 1, 24 Stat. 505 [U. S. Comp. St. 1901, p. 752], authorizing suits against the United States that "no suit against the government of the United States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made," in the case of a suit by a marshal to recover fees or disbursements, begins to run as to each item from the time the service was rendered or the disbursement made, and not from the expiration of the plaintiff's term of office.

2. SAME—SUIT AGAINST CITIZEN—RULES GOVERNING RIGHT OF RECOVERY.

When the sovereign comes into court to assert a pecuniary demand against the citizen or subject, the court has authority and is under duty to withhold relief to the sovereign, except upon terms which do justice to the citizen or subject, as determined by the jurisprudence of the forum in like subject-matter between man and man.

3. ESTOPPEL—ACTS OF GOVERNMENT OFFICERS.

If officers of the United States are authorized to shape its course of conduct as to a particular transaction, and they have acted within the purview of their authority, their acts or omissions may in a proper case work an estoppel against the government.

[Ed. Note.—Estoppel against state or United States, see note to State of Michigan v. Jackson, L. & S. R. Co., 16 C. C. A. 353.]

4. UNITED STATES—COMPENSATION OF OFFICERS—RECOVERY OF PAYMENTS.

Where a marshal has in good faith rendered accounts against the United States, covering services of his deputies, which have been audited and allowed by the proper accounting officers, and paid in accordance with the rules which have always previously been recognized as governing such allowances, and with knowledge that the greater part of the money would be paid over to the deputies rendering the services, the government is not entitled to recover the sums so paid from the marshal after years have elapsed, and he has gone out of office, and is without remedy to recoup his loss, and during which time no objection has been made to such payments by the executive departments or by Congress, which continued to appropriate money therefor, even though the allowances may have been made under an erroneous construction of the law.

In Error to the United States Circuit Court for the Middle District of Alabama.

Action by a United States marshal for fees and expenses. Counterclaim by the United States. This writ of error is prosecuted from a judgment settling the accounts of the parties.

The statement and opinion filed below, and here reprinted from 139 Fed. 409, were in full as follows:

On the 8th of April, 1898, B. W. Walker, late marshal for the Middle district of Alabama, brought suit against the United States in the Circuit Court, under the act of March 3, 1887, to recover $2,268 upon certain disallowed claims for mileage, fees, and expenses between February 14, 1890, and September 16, 1893. The United States interposed the plea of the statute of limitation of six years. Afterwards, on the 2d day of July, 1899, the United States set up a counterclaim for $842. All the claims were referred to a master to state the accounts. He reported on the facts only; his conclusions of law being waived by consent. The case and counterclaim were submitted on the report, and agreement as to certain facts, and the admission by Walker that he was not entitled to recover for the services set forth in Exhibit B to the master's report. Walker moved for decree in his favor upon the matters set

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forth in Exhibit A to the master's report, and for the disallowance of the government's counterclaim. The government made a counter motion to reject Walker's claims, and for judgment in its favor on its counterclaim. The facts are fully set forth in the opinion.

JONES, District Judge. The proviso to the first section of the act "to provide for the bringing of suits against the government of the United States," approved March 3, 1887 (24 Stat. 505, c. 359 [U. S. Comp. St. 1901, p. 752]), under which this suit is brought, declares:

"No suit against the government of the United States shall be allowed under this act, unless the same shall have been brought within six years after the right accrued for which claim is made."

Petitioner's counsel contend that:

"The mere items of the account are but the details of the daily duties of the marshal, and continue until his term of office expires; that the government always regards the compensation of the marshal as subject to revision during his term of office; that he has the right, up to the time he ceases to be marshal, to present any omitted claims for services, and the limitation does not begin to run until he ceases to be marshal."

The court, under well-settled principles, has no authority to engraft exceptions upon a statute of limitations which the statute itself does not make. Adopting the petitioner's view would require the court to hold that the limitation does not run against claims for services by the marshal so long as he remains in office, notwithstanding the command of the statute that the limitation shall begin to run from the time the right accrued. Kendall v. United States, 107 U. S. 125, 2 Sup. Ct. 277, 27 L. Ed. 437. Each item of service rendered by Walker prior to the 8th day of April, 1892, is clearly barred.

In seeking the principle which must control the fate of the counterclaim, it is important to bear in mind the law and the facts of the particular transaction out of which that claim arose, and the time and circumstances under which it is brought forward. The law did not contemplate that the marshal could discharge his important duties without help, and therefore created the office of deputy marshal. It did not contemplate that either of these officers should perform public services without remuneration, and consequently made proper provision therefor. At the time of the transactions here involved that remuneration did not take the form of a salary, but consisted of a fee or allowance for each service in the marshal's settlements at stated periods with the Treasury Department. In the matter of his compensation, the deputy marshal, although a public officer performing public services, occupied the anomalous position of a stranger to the government. Douglas v. Wallace, 161 U. S. 349, 16 Sup. Ct. 485, 40 L. Ed. 727. Nevertheless the law bound the marshal to include the fees earned by his deputies in his accounts, and to collect them from the government, in order that he might not retain more than the maximum compensation allowed by law, and that he might have a fund out of which to pay his deputies for their services. It has always been the rule that the marshal shall collect such fees, and pay over to his deputies their proportion. The agreed facts do not disclose whether Walker's deputies

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bound themselves in any way to repay to him the portion paid over to them, if the government, after allowing and paying these fees to the marshal, should seek to recover them from him; and it is unnecessary, therefore, to inquire whether in the absence of such a contract he could, under any circumstances, recover what he had paid them, through mistake of law, for services rendered by them. We may assume that, as between them, he bears the loss. In the discharge of his legal and moral duty, Walker prepared and rendered his accounts, including therein these particular fees, during each year of his incumbency of the office. He made no concealment or misstatement, and there was no fraud. Every one acted honestly and in good faith, relying on a long, and during the time these payments were made an unbroken, practice of the government to allow and pay for these particular services. The court to which the accounts were presented approved them, and the proper officials of the Treasury Department allowed them, and Walker collected the money from the government, and paid three-fourths of the amount of these fees to his deputies from time to time as he made settlements, and retained the balance, as was his duty to do, under the law as then construed by every department of the government which had acted or spoken on the subject. The government knew, when the money was paid to Walker, that the greater part of it would be immediately paid out to others, who in fact, whatever may be the legal theory, had rendered services to the government, to pay for which this very money was paid to him. The government repeatedly and uniformly paid these fees in a consecutive course of dealings with him for four years, and then, after a delay of five years after Walker's retirement from office, for the first time makes known its intention to correct what was at least a common error by ripping up all these settlements and compelling him to refund the money. It knew full well that every day's delay in making known to Walker its changed attitude would add to his difficulty in saving himself harmless, if, indeed, it was ever in his power after paying over the money to his deputies. If a like transaction had occurred between Walker and anybody else, he could successfully reply, when sued to recover the money:

"You are estopped. You knew that in the course of our business dealings we had repeated settlements, in which I dealt with you, not only for myself, but for third persons to whom I was under obligation to pay for services which you recognized were for your benefit, and that out of the money you paid me, and on the faith of your acts, I was constantly paying over a part of it to these third persons. I rendered you fair and honest statements. You had my accounts examined by your representative, and we had settlements, to which we both then agreed, and on which you paid the balances in my favor. I accepted these settlements as finalities. It is now too late for you to reverse your attitude towards me as to those past and settled transactions."

After much deliberation, the court has reached the conclusion, whatever may be the general rule, that under the facts of this case the United States stands, as to its counterclaim, upon no better footing than would the private citizen, though doubtless it may recover money paid under mistake of law by its officers. It is conceded that the money the government now seeks to recover by its

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counterclaim was illegally paid out, that the United States cannot be defeated or barred of its rights by the mere laches of its agents, that it cannot be estopped by the unauthorized acts of its accounting officers, that it is not subject to the statute of limitations, and that the unauthorized acts of his agents never bind the sovereign. It is, however, equally true, when the sovereign becomes an actor in a court of justice, especially in an action which proceeds on equitable principles, that his rights must be determined upon those fixed principles of justice which govern between man and man in like situation, and that the sovereign will be bound, as an individual would be, by his own acts, or by (what is the same thing) acts of his agents lawfully done within the purview of the authority he commits to them.

United States v. Arredondo, 6 Pet. 712, 8 L. Ed. 547, was a suit, under an act by which the United States consented to be sued, to determine whether certain lands in Florida were private property, or passed to the government by the cession from the King of Spain. The Supreme Court said:

"By consenting to be sued, and submitting the decision to judicial action, they have considered it as a purely judicial question, which we are now bound to decide as between man and man on the same subject-matter."

When the sovereign sues, he brings with him no privileges which exempt him from the common fare of suitors. King of Spain v. Hullett, 1 Clark & F. 333; Rothschilds v. Queen of Portugal, 1 Young & C. 594. In the latter case, a question arose as to the right of the Rothschilds to retain interest out of a fund in their hands against the Queen. Baron Alderson said:

"Now, if the conduct of her most faithful majesty, through her lawfully authorized agents, was such as to induce the Rothschilds as reasonable men to suppose that by such delay they were acting in conformity to her majesty's wishes, they would justly be entitled to charge her with that interest."

In The Newbattle, 10 Ct. App. Prob. Div. L. R. 33, the owners of the Marie Louise asked that the Belgian government, which had instituted proceedings in admiralty to recover damages for a collision with one of its ships, be required to give security for the payment of damages to the defendants, who brought a counterclaim. The order was granted, and affirmed on appeal. Brett, Master of the Rolls, said:

"If a sovereign prince invokes the jurisdiction of the court as a plaintiff, the court can make all proper orders against him. The court has never hesitated to exercise its powers against a foreign government to that extent."

Cotton, L. J., said:

"When a government comes in as a suitor, it submits to the jurisdiction of the court and to all orders that may be properly made. Regard must, of course, be had to the fact that in this case the King of the Belgians is a sovereign prince, but the order, nevertheless, is a proper one. It is a reasonable principle that a plaintiff, whose ship cannot be seized, and against whom a cross-action has been brought, put the defendant in the position as if he (the defendant) were a plaintiff in an original action against a defendant whose ship could be arrested as security."

The Supreme Court of the United States upholds the rights of its citizens against its own government, when it enters its courts

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against them, quite as far as the courts of England go in enforcing the rights of English subjects in suits against them by foreign princes. Indeed, it would seem it has gone a little further. There is no statute which authorizes the courts of the United States to seize property of the United States or to enforce liens thereon; yet, in The Davis, 10 Wall. 17, 19 L. Ed. 875, property of the United States on board of a vessel,which was seized by the marshal before it came into the actual possession of any officer of the United States, was subjected to a lien for salvage, against the objection of the United States. The Supreme Court said:

"The United States, without any violation of law by the marshal, was reduced to the necessity of becoming claimant and actor, to assert her claims to the cotton. Under the circumstances, we think it was the duty of the court to enforce the lien of the libelants for salvage before it restored the cotton to the officers of the government."

A like doctrine, upon like reasons, was applied in The Siren, 7 Wall. 159, 19 L. Ed. 129.

The underlying principle of all the decisions is that, when the sovereign comes into court to assert a pecuniary demand against the citizen the court has authority, and is under duty, to withhold relief to the sovereign, except upon terms which do justice to the citizen or subject, as determined by the jurisprudence of the forum in like subject-matter between man and man. The acts or omissions of its officers, if they be authorized to bind the United States or to shape its course of conduct as to a particular transaction, and they have acted within the purview of their authority, may in a proper case work an estoppel against the government. Lindsey v. Hawes, 2 Black, 560, 17 L. Ed. 265; Davis v. Gray, 16 Wall. 203, 21 L. Ed. 447; U. S. v. Bank of Metropolis, 15 Pet. 392, 10 L. Ed. 774; Sinking Fund Cases, 99 U. S. 719, 25 L. Ed. 496; U. S. v. Barker, 12 Wheat. 559, 6 L. Ed. 728; Cooke v. U. S., 91 U. S. 398, 23 L. Ed. 237; Duval v. U. S., 25 Ct. Cl. 60; Hartson v. U. S., 21 Ct. Cl. 456. The principle that the sovereign is bound by his own acts, and those of his lawfully authorized agents within the purview of their authority, is a wholesome one, and requires the courts to visit an estoppel upon the sovereign in a proper case, where he invokes judicial action. While the application of the doctrine is attended with difficulty under our institutions, where sovereignty of the United States does not reside in any one person or collection of persons, that difficulty is no reason for rejecting the operation of the principle, if the facts of the particular case will admit of its application.

After Walker went out of office and settled his accounts, the relation between him and the government was no longer that of subordinate and sovereign in the administration of a function of government. Thereafter, they occupied the status of creditor and debtor, and that status was such that he could not be made to answer, except by reopening repeated and closed settlements. This creditor owed this debtor the same duty, not to prejudice him by delay in making known his purpose to go behind the settlements and recover money paid under them, that a private person would

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under similar circumstances. The attention of the government was called to the fact that these payments were being made in Tanner's suit in the Court of Claims in 1891, in which it was cast. The United States certainly knew the facts in 1893, when the Supreme Court reversed the decision of the Court of Claims. It waited five years after Walker went out of office before it manifested any dissatisfaction. It must be kept in mind that this is not a mere case of debtor and creditor, and mere delay on the part of the government to sue the debtor. If that were the whole case, the principle that the government is not bound by the laches of its agent would be fatal to the debtor's right to complain. Here there is much more. By formal and executed settlements the defendant occupies the status toward the government of a creditor whose debt had been paid, and the government occupies the relation to him of a debtor who had discharged its obligation. The relation of debtor and creditor cannot be revived, except by a changed status between the parties. The government, in order to succeed, must be entitled to change its status to Walker, and Walker's status to it. This can be effected only by reopening and vacating the executed settlements. Some affirmative act is necessary on the part of the government to effect that changed status. Whenever an affirmative act is necessary on behalf of the United States to effect or enforce a pecuniary right against an individual, the officer or department whose duty it is to do that act represents the United States as to that matter, and it is bound by his action or nonaction. United States v. Barker, 12 Wheat. 559, 6 L. Ed. 728; United States v. Bank, 15 Pet. 377, 10 L. Ed. 774.

The reopening of closed and executed settlements involves matters of discretion and judgment, and may jeopardize pecuniary interests of the government. Such questions are governmental or political in a sense, and are primarily committed to the executive departments. The laws of the United States certainly authorize some of its executive departments to determine its policy as to the reopening of executed settlements, and put upon them the duty to determine whether it is to the interest of the United States to change its status as to them. If the department to which is committed the duty to determine whether the government will reopen a closed and executed settlement, and thus to treat as a debtor one whom it has heretofore treated as a paid creditor, delays or postpones its decision to reopen such matter until it cannot be done without prejudice and injury to one who, believing himself a creditor, and whom the United States has treated as such, in reliance upon these settlements has gone on paying out money to people for whom he really collected it from the government, it would seem, on principle, that such delay in deciding or moving under such circumstances, by such a representative of the United States, would estop it. This is something very different from the mere negligence or failure to act, which is only the laches of an agent, for which the United States is not responsible. It is not laches in any sense. It involves no element of failure to discharge or unauthorized discharge of duty. On the contrary, it is the taking of a position on behalf of the gov-

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ernment by lawfully deciding a matter which the sovereign commits to the determination of that agent. That determination, of course, has no element of res adjudicata, and therefore may be changed by the government at will; but, as long as the status made by the executed settlement and the failure to reopen it exists and remains in force, it is the status or act of the United States. If there be delay in changing this status to the prejudice of the party who settled with the government, it is the delay of the United States. It is not necessary, however, to rest the disposition of the counterclaim, on that ground.

On the faith of the action of the government officials, Walker has paid over, from time to time through a series of years, without notice of objection from any quarter, a large part of the money to third persons for services by them rendered to the government, and in whose behalf it was his duty to present the account to the government. He has now no recourse against those third persons. The money, it turns out, was illegally paid to him. The fact has been known to the United States for years. The United States has remained inactive for years. It is the United States which now sues. It is the United States which seeks to put Walker at a disadvantage by avoiding his just claims by the statute of limitations, and yet to compel him to pay money it knew, at the time it paid it to him, he would almost immediately pay out to third persons for services they had rendered to the United States, being induced thereto by the usage and acts of the officers of the United States in time and again acknowledging and paying him such claims. Certainly, if no other department of the government could take an attitude which could bind the United States, Congress, which represents its sovereignty as to such matters, could pursue a course of conduct with reference to it, which would be that of the United States, and bind it. The history of its legislation, and its entire attitude, show that Congress, at the time these payments were made, considered them lawful, and did not disapprove them. Congress enacted the law by which deputy marshals performed services for the United States in the name of the marshal. Congress knew that the deputy marshals were compensated for their services by a portion of the fees earned by them, and that its auditing officers had for years allowed and paid the fees here in dispute. Congress, with knowledge that the United States was allowing and paying these claims, and that the marshals in turn were constantly collecting and paying them over to deputy marshals, appropriated money, year after year, to pay the expenses of the courts, which it knew were made up in part in payment of these very fees. There was nothing to put even the most prudent man on inquiry, or to suggest that the claims were improper or illegal, or that the government would retrace its steps and at some future time seek to hold Walker accountable for receiving and paying out money, which all of its departments, time after time, admitted was due to him, and as to which, whatever may have been his technical relations, he was in fact and in morals only a conduit to pass the money to the persons to whom it belonged. It is not money which the government ex

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æquo et bono is entitled to recover from him. Whether or not the payments, at the time they were made to Walker, were in fact authorized by the existing statutes is not now material. They are transactions which have been executed and closed, and Congress, the legislative power, which could treat them as legal at that time, and thereby make them legal, did treat them as legal at that time.

In United States v. McDaniel, 7 Pet. 15, 8 L. Ed. 587, it is said:

"Usages have been established in every department of the government, which have become a kind of common law and regulate the rights and duties of those who act within their respective limits, and no change of such usages can have a retrospective effect, but must be limited to the future. A usage cannot alter the law, but is evidence of the construction given to it, and must be considered as binding on past transactions."

While this language, in view of the case before the court and subsequent decisions, cannot be construed as a declaration that money paid out without legal authority in transactions which have been settled and closed, and in accordance with the usages of the government, cannot afterwards be recovered, it is most convincing to show that the reopening of a settled and closed account, when it would result in hardship and injustice, may be prevented, if the facts and circumstances give rise to the principle of estoppel.

If this action of Congress, the usages of the executive departments, and the approval of the courts upholding the validity of these payments during the whole period of the repeated settlements with Walker, did not then represent the attitude of the sovereign as to this matter, and do not now estop the United States from recovering money honestly received by Walker and paid out by him, in reliance upon its attitude, to third persons to whom the government expected it to be paid, and against whom he has now no redress, it is difficult to conceive of any case where the sovereign may not make his courts the mere instruments of his will to amerce his own citizens for pursuing a line of conduct which was the natural and inevitable result of the sovereign's long and deliberate course of dealing with them. The sovereign has no prerogative to compel his courts to depart from the fixed principles of justice when he enters their portals to adjust his business transactions with his own citizens.

It must be admitted that the estoppel as to the portion of these fees which was retained is not as strong as that relating to the portion which Walker paid out. It would seem, however, that the United States should not now be permitted to recover that portion any more than the other. These payments, when made, were treated by Congress as valid, as we have seen above, and the settlements were closed and executed before Walker went out of office, and he accepted them as finalities. The evidence does not enable the court to determine whether, if this portion of the fees be refunded by Walker, he may not be correspondingly prejudiced as to his compensation as marshal in some of the years he was in office. The amount was calculated in the sums which made up the maximum compensation he was entitled to retain during each of those four years. If the amount be now taken from him, he cannot recoup his loss, as he could at the time, by retaining a corresponding

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amount of other fees earned in those years. The only evidence before the court is that owing to disallowances including payments about the Mobile & Girard Railroad, Walker's aggregate compensation for the whole term of nearly four years was $550 less per annum than the maximum allowed him by law each year. This does not prove that in some of these years he did not account to the government for more than $6,000 of fees; the portions here involved being included in that amount. It would seem the burden is on the government, in such a transaction as that now before the court, to show that the accounts could be reopened to the extent it asks without doing injustice in this particular to Walker. Besides, if the court correctly apprehends the principle which controlled the government's counterclaim in Badeau's Case, 130 U. S. 439, 9 Sup. Ct. 579, 32 L. Ed. 997, it is impossible to distinguish this matter from that.

In Johnson v. United States, 124 U. S. 254, 8 Sup. Ct. 446, 31 L. Ed. 389, the Supreme Court said:

> "It would be an exceedingly dangerous doctrine that settled accounts, where the United States have acted on the settlement and paid the balance found due on the basis of that settlement, could be opened or set aside merely because some of the prescribed steps in the accounting, which it was the duty of the head of the department to see had been taken, had been in fact omitted, or if they could be opened and set aside on account of technical irregularities in the allowance of expenses years afterwards, when the remedy of the party against the United States is barred by the statute of limitations, and the remedies of the United States on the other side are intact, owing to its not being subject to any act of limitations."

While that is not exactly this case, this observation of the court illustrates the danger of the doctrine which the government pushes in this case. Here, owing to the statute of limitations, the government has avoided just claims of Walker which exceed the demand involved in the counterclaim. To allow the government under such circumstances to kill his claims with the bar of the statute, and then to take advantage of its sovereign character to recover money from Walker, who received and paid out the money in good faith, and who cannot protect himself by the statute of limitations, would be manifestly most unjust. Walker's conduct does not bring him within the principle of McElrath v. United States, 102 U. S. 441, 26 L. Ed. 189. He, unlike McElrath, accepted the final settlements made with the auditing department in full of the accounts then presented, and did not commence suit against the government to avoid its ruling as to any matters involved in those settled accounts. His attitude does not, as did that of the plaintiff in McElrath's Case, "invite the court to go behind the settlement." The result is that all the claims of Walker accruing prior to the 8th of April, 1892, must be rejected, and those accruing after that date must be allowed; and the counterclaim of the government must be disallowed.

This opinion will be filed in the case as the statute requires, and the clerk will enter upon the minutes the following findings of fact and conclusions of law, and the judgment of the court thereon:

Came the petitioner by his attorneys, also came the United States by the district attorney, and the cause and the counterclaim are

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submitted for decision upon the pleadings, the master's report filed herein on the 30th of June, 1905, the agreed state of facts on file, and the admissions of the parties in open court.

Finding of Facts.

Thereupon the court finds the facts to be as follows: On the 8th day of April, 1898, Walker brought suit against the United States to recover the sum of $2,268 upon certain disallowed claims for mileage, fees, and expenses claimed to be due him between February 14, 1890, and September 16, 1893. These various claims are itemized and set forth in Exhibits A and B to the master's report. Walker was duly appointed and qualified as marshal for the Middle district of Alabama on October 21, 1889, and continued to discharge the duties of the office until June 30, 1893, when his successor qualified. During that period he had various settlements with the Treasury Department up to and including September 16, 1893. None of the items or claims embraced in his suit were included in any of Walker's settlements with the Treasury Department, but consist entirely of items omitted from his accounts on those settlements. On the various settlements made with him, Walker accepted the amounts allowed in full of the accounts presented. The petitioner, by himself and deputies, actually and necessarily performed each and all the services set forth and specified in Exhibit A to the master's report at the instance and request of the United States; and the sums charged respectively therefor are the legal fees and charges authorized by law, which Walker is entitled to demand and receive from the United States for the services, which aggregate the sum of $1,132.84 and are still unpaid. The account containing the items, as well as those specified in Exhibit B, was properly certified and presented to the accounting officers of the Treasury Department, and disallowed before suit brought. The government's counterclaim, filed in this court July 2, 1899, is made up of amounts paid by the government for services of Walker and his deputies in and about 421 warrants of commitment, at $2 each, on the various dates and in the cases specified in Exhibit C, amounting in all to the sum of $842, which, as the counterclaim alleges, were paid to him "through errors and misconstructions of law by the occounting officers of the government." These items went into Walker's regular accounts, and were included in his settlements with the Treasury Department, and the amounts thereof were paid over to him from time to time as he made his various settlements, up to and including September 16, 1893, and have never been refunded by him. The services for which claim is made in each of these cases were actually rendered. Exhibit C to the master's report correctly sets forth the amount paid to the plaintiff as to these commitment warrants, and the dates and cases in which the payments were made. No claim is made by Walker in his suit for allowance for commitment warrants. No such allowances were made or paid to Walker, after March 6, 1893, the date of the decision in United States v. Tanner, 147 U. S. 661, 13 Sup. Ct. 436, 37 L. Ed. 321, wherein it was held that such payments were illegal. Walker



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paid three-fourths of the amount received by him upon these commitment warrants to his deputy marshals before the government filed its counterclaim; and at that time all remedy of Walker, if he ever had any, to recover from his deputy marshals the amount demanded of him by the government on this account, was barred by the statute of limitations. No demand was ever made upon Walker to refund these commitment fees, or dissatisfaction expressed to him by any officer of the government as to their allowance and payment, until the filing of the government's counterclaim. He presented and was allowed these claims for commitment warrants in good faith, believing them to be legal under the long-continued practice of the accounting officers of the Treasury Department. Exhibits A, B, and C to the master's report correctly state the dates, services, amounts, and case in which the various claims were made for services, mileage, and expenses, which are involved in this suit and counterclaim. The yearly compensation received by Walker during any one year of his term of office is not shown. The only evidence is that "Walker did not receive the maximum compensation of $6,000, allowed by law during his term of office from 1889 to 1893, but by disallowances and payments to agents of the Mobile & Girard Railroad received a less sum, the deficiency being for the four years about $2,200"; and this the court finds to be true.

## Conclusions of Law.

1. The court finds as a matter of law that the United States is estopped and precluded from maintaining its counterclaim, amounting to $842, and that it cannot now rightfully demand the payment thereof from the petitioner.

2. That the petitioner's admission in open court that he is not entitled to recover of the United States the claims set forth in Exhibit B to the master's report is correctly made in point of law, and that as a matter of law petitioner is not entitled to recover any of the claims set forth in Exhibit B.

3. That petitioner's claims set forth in Exhibit A, more particularly specified and described in the auditor's certificates mentioned therein, to wit, Nos. 119,133, 120,807, 122,904, 125,880, 128,907, 131,-451, 133,292, 133,461, 135,282, and 137,418, are barred by the statute of limitations of six years.

4. That the claims set forth in Exhibit A to the master's report, and more particularly specified in the auditor's certificates contained therein, to wit, Nos. 139,735, 142,073, 145,858, and 149,120, amounting in the aggregate to $217.86, are not barred by the statute of limitations, but constitute a valid obligation of the United States, which it is legally bound to pay the petitioner.

## Judgment.

Now, in consideration of the premises, it is considered, ordered, and adjudged by the court as follows: (1) That the counterclaim interposed in this suit by the United States be, and the same is, hereby rejected and disallowed. (2) That the claims of the petitioner set forth in Exhibit B to the master's report be, and the

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same are, hereby disallowed and rejected. (3) That all the claims preferred by petitioner for services rendered prior to April 8, 1892, and which are particularly specified and described in the auditor's certificates Nos. 119,133, 120,807, 122,904, 125,880, 128,907, 131,451, 133,292, 133,461, 135,282, and 137,418, which are made a part of the master's report in Exhibit A, are barred by the statute of limitations, and the same are hereby rejected and disallowed. (4) That the petitioner's claims, specifically set forth and described in the auditor's certificates Nos. 139,735, 142,073, 145,858, and 149,120, amounting in the aggregate to $217.86 principal, are not barred by the statute of limitations, and constitute a valid obligation of the United States, which it is legally bound to pay to the petitioner. And it is thereupon further ordered, adjudged, and decreed that the said B. W. Walker do have and recover of the United States of America, in the mode provided by law, the sum of $217.86, together with the costs of this suit from the time of joining issue upon the plaintiff's right to recover, which are now allowed and taxed at the sum of $30; the same being the amount of fees paid to the clerk of the court.

W. S. Reese, Jr., U. S. Atty., J. Sternfeld, Asst. U. S. Atty., and E. J. Parsons, U. S. Atty.

W. A. Gunter, for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and MEEK, District Judge.

PER CURIAM. For the reasons given by the judge in the court below, the judgment of the Circuit Court is affirmed.

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(148 Fed. 581.)

## UNITED STATES v. DONALDSON-SHULTZ CO.

(Circuit Court of Appeals, Fourth Circuit. November 8, 1906.)

No. 659.

JUDGMENT—RES JUDICATA—ACQUITTAL IN CRIMINAL PROSECUTION AS BAR TO TO CIVIL SUIT.

The acquittal of a defendant indicted under section 12 of Act March 3, 1899, 30 Stat. 1151 [U. S. Comp. St. 1901, pp. 3541, 3542], for creating an obstruction in a navigable stream, in violation of section 10 of said act, is not a bar to a subsequent suit in equity brought by the United States under the same section against the same defendant to compel the removal of such obstruction; the issues and measure of proof required in the two proceedings not being the same.[1]

Appeal from the Circuit Court of the United States for the Eastern District of Virginia, at Richmond.

For opinion below, see 142 Fed. 300.

L. L. Lewis, U. S. Atty.

H. I. Lewis and Isaac Diggs, for appellee.

[1] See note at end of case.

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Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

BOYD, District Judge. An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors and for other purposes. Approved March 3, 1899. 30 Stat. 1121.

Sections 10 and 12 of the said act (30 Stat. 1151 [U. S. Comp. St. 1901, pp. 3541, 3542]) are as follows:

"Sec. 10. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the chief of engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the chief of engineers and authorized by the Secretary of War prior to beginning the same."

"Sec. 12. That every person and every corporation that shall violate any of the provisions of sections nine, ten and eleven of this act, or any rule or regulation made by the Secretary of War in pursuance of the provisions of the said section fourteen, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding twenty-five hundred dollars nor less than five hundred dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any circuit court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney-General of the United States."

In January, 1905, the Donaldson-Shultz Company, the appellee in this case, was indicted in the District Court of the United States for the Eastern District of Virginia for violation of section 10 of this act; the charge in the indictment being, substantially, that the said company, being a corporation under the laws of the state of Virginia, had, on the 1st day of October, 1902, unlawfully built in Urbanna creek, a navigable water of the United States, at a point in the said creek where no harbor lines had been established, to wit, at Urbanna, in the said district, a certain wharf, a wooden structure, 175 feet long and 20 feet wide, and that the same was built by the Donaldson-Shultz Company on plans not recommended by the chief engineer of the United States army or authorized by the Secretary of War, etc. And, further, that the said company, on the said day, did unlawfully create an obstruction to the navigable capacity of said Urbanna creek, a navigable water of the United States, at Urbanna, in the said district, by building a large wooden structure, etc., extending from the left-hand shore out into the channel limits of the said creek a distance of 10 feet, thereby causing an obstruction to the navigation of said creek, such obstruction being created by the said company without any authority so to do by

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the Congress of the United States, etc. On the 16th of January, 1905, the said company was tried upon this indictment in the District Court of the United States for the Eastern District of Virginia, at Richmond, upon the plea of not guilty, and the jury, which was sworn and impaneled in the case, rendered a verdict of not guilty. Whereupon, the said company was discharged. Thereafter, on the 31st of March, 1905, the United States Attorney for the Eastern District of Virginia, by direction of the Attorney General of the United States, brought a bill of complaint in the Circuit Court of the United States for the said district against the Donaldson-Shultz Company, setting forth the same facts, in substance, as those constituting the averments in the indictment upon which the company had been tried and acquitted. The bill further alleged that the said defendant corporation, although often requested so to do, had not removed the said wharf from the waters aforesaid, and particularly had not removed the same from the channel limits of the said creek, and that the existence of the said wharf was a serious and permanent obstruction to the navigation of the said Urbanna creek at the point aforesaid. The prayer of the complainant was for writ of mandatory injunction, requiring and compelling the Donaldson-Shultz Company, its officers, agents, and employés to remove the said wharf and obstruction from the said Urbanna creek, or at least to the extent that the same constitutes an obstruction to the navigation in the said creek. The company appeared in response to the service of the writ of subpœna, and on June 3, 1905, filed to the bill of complaint a plea of res judicata, as follows:

"In the Circuit Court of the United States for the Eastern District of Virginia.

"The United States of America v. The Donaldson-Schultz Company, a Corporation. In Equity.

"And the said defendant comes and says that the said plaintiff heretofore, to wit, on the 5th day of January, 1904, in the District Court of the United States, for the Eastern District of Virginia, held at Alexandria, Virginia, impleaded the said defendant and indicted it, in a certain criminal indictment containing three counts for violating the very same statute and not performing and doing the very same things, and each and every of them in the plaintiff's bill in equity here mentioned, and filed in this Honorable Court, which said indictment is in the words and figures following, to wit."

Then follows in full the indictment upon which the defendant company was tried, which it is not necessary to reproduce here. The Circuit Court held this plea sufficient and that the acquittal of the defendant upon the criminal indictment was a bar to the present civil action, and thereupon the bill of complaint was dismissed, and the United States, by its attorney, having duly excepted to this ruling of the court, brings the case here by appeal.

There are many instances in which a navigable stream or a public way may be obstructed, and yet there might be such an uncertainty about the testimony which was adduced in the trial of the criminal indictment that the person charged with the obstruction would be acquitted, and still, as a fact, the obstruction might exist. The case of Coffey v. United States, 116 U. S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684, is cited and relied upon largely to sustain the decision of the Circuit

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Court, but in our opinion that is not an analogous case at all. Coffey was indicted under section 3257 of the Revised Statutes [U. S. Comp. St. 1901, p. 2112], which provides that:

"Whenever a person engaged in carrying on the business of a distiller defrauds or attempts to defraud the United States of the tax on the spirits distilled by him, or of any part thereof, he shall forfeit the distillery and distilling apparatus used by him, and all distilled spirits found in the distillery and on the distillery premises, and shall be fined not less than five hundred dollars nor more than five thousand dollars and shall be imprisoned not less than six months nor more than three years."

Upon this indictment he was tried and acquitted. An information was also filed on behalf of the United States against the distillery and the distilling apparatus used by Coffey, and also against all the distilled spirits found in his distillery and on the distillery premises. The information was tried after Coffey had been acquitted in the trial upon the criminal indictment, and the Supreme Court very properly held that:

"Where an issue raised as to the existence of the act, or fact denounced, has been tried in a criminal proceeding instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit in rem by the United States, where as against him the existence of the same act or fact is the matter in issue as a cause for the forfeiture of the property prosecuted in such suit in rem."

The reason and soundness of this principle are readily seen, because in the issue between the United States and the person charged with the commission of the acts which are the basis of the forfeiture it is determined that the acts were not committed and the facts did not exist. Consequently there was no forfeiture, because the acts must have been committed and the facts must have existed at the time, in order to vest the title of the offending thing in the government as forfeited property. The forfeiture of Coffey's distillery and other property was a part of the punishment prescribed by the law for the criminal act which he was alleged to have committed. The jury having found that the criminal act alleged had not been committed, then, of course, it follows that the punishment could not be inflicted. And this line of reasoning is followed out substantially in Boyd, Claimant, v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746. This was a proceeding in rem against certain merchandise claimed to be forfeited to the United States because fraud had been committed against the government in its importation. The statute under which the proceeding was instituted provided, also, that the person offending should be punished by fine and imprisonment, in addition to the forfeiture of his goods. In that case Mr. Justice Bradley, in delivering the opinion of the court, says:

"These are the penalties affixed to the criminal acts; the forfeiture sought by this statute being one of them. If the indictment had been presented against the claimant, upon conviction the forfeiture of the goods could have been included in the judgment."

The facts in this case are the converse of the Coffey Case; for here it is held that a conviction of the criminal act carries with it the forfeiture of the goods, whilst in that case it is held that an acquittal of the person charged with the criminal act upon which the forfeiture is claim-

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ed is a bar to the forfeiture; but there is no such question involved in the case before us. There is no claim for the forfeiture of the property of this company, for we do not find anywhere in the statute making it a misdemeanor to obstruct a navigable water that the material used in the construction of the obstruction is forfeited to the United States. This is not made a part of the punishment as in the statutes passed upon in the Coffey Case and in the Boyd Case. The purpose of the statute we are considering is not to take property from the owner, but to keep navigable waters free from impediments which would obstruct their free and convenient use for navigation. If the mandatory injunction sought by this proceeding was issued, the result would simply be to require the appellee to remove the obstruction—to take his property away. It is argued by the appellee that because the United States proceeded first by indictment, and upon the trial there was verdict of acquittal, that conditions must remain in statu quo, and that the government has no further right to proceed in a civil action to remove an obstruction to a navigable stream which it is alleged still exists. If this be the law, then the right of the government to maintain the navigable waters in a condition suitable for navigation and free from obstruction would, in many cases, be absolutely destroyed by the vicissitudes, the uncertainties, and the local environments attending criminal trials. An obstruction might exist and yet the evidence adduced in a criminal trial might not be sufficient in the minds of the jury to convince them beyond what the law calls a reasonable doubt, which is necessary in such trials in order to authorize a verdict of guilty. The element of an intent might be wanting if such were held by the trial court to be necessary. The person indicted may have placed the obstruction under a bona fide belief that he had a right to do it and this might result in his acquittal, and yet shall it be contended that, although this acquital has taken place and in fact the obstruction is there, the government is deprived of its civil remedy to have it removed? We think not.

It is our conclusion that there was error in the ruling of the Circuit Court, and the case is remanded, in order that proceedings may be had in accordance with this opinion.

Reversed.

## NOTE.

### Effect of Acquittal in Criminal Prosecution on Liability in Tort for the Alleged Criminal Act.

#### I. In General.

[a] (U. S. 1849) An acquittal of the commanding officer of a squadron, when tried for assault and battery and false imprisonment of a seaman, is not admissible evidence in his favor, in a civil suit by the seaman against him for the same acts.—Wilkes v. Dinsman, 48 U. S. (7 How.) 89, 12 L. Ed. 618.

[b] (Ala. 1889) In an action by a defendant in ejectment, after judgment for plaintiff, to recover for the crops, there was no error in excluding evidence of the acquittal of the ejectment defendant in a criminal prosecution instituted against him for removing the crops, nor in excluding evidence of a subsequent recovery by him against the ejectment plaintiff for maliciously prosecuting such criminal case, as a judgment in a criminal case is not generally evidence of the facts on which it is founded.—Carlisle v. Killebrew, 89 Ala. 329, 6 South. 756, 6 L. R. A. 617.

[c] (Cal. 1896) Where, in a criminal action in the superior court, which is a court of general jurisdiction, a question of fact upon which the court's juris-

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diction depended was litigated, and decided in favor of the prosecution, the question is judicially decided as between the parties, and the decision cannot be attacked in habeas corpus proceedings brought by defendant in another court.—Ex parte Stephen, 114 Cal. 278, 46 Pac. 86.

[d] (Conn. 1792) A former prosecution and acquittal is a good bar to an action for the same cause, matter, and thing.—Leavensworth v. Tomlinson, 1 Root, 436.

[e] (Ga. 1875) In a suit by a widow for the homicide of her husband, the record of the acquittal of defendant, under an indictment for the murder of the husband, is not evidence for defendant in the civil suit; and a plea of such acquittal is demurrable.—Cottingham v. Weeks, 54 Ga. 275.

[f] (Ga. 1889) The record of defendant's acquittal on an indictment for killing cattle, as constituting the offense of malicious mischief, though plaintiff was the prosecutor, is not admissible in a civil action for damages.—Tumlin v. Parrott, 82 Ga. 732, 9 S. E. 718.

[g] (La. 1860) In an action for damages arising ex delicto, the fact that defendant was acquitted in a criminal prosecution for the offense, notwithstanding plaintiff gave his testimony against him, unsupported by any other evidence of justification, cannot benefit defendant, where there is other evidence sufficient to support the demand for damages.—Beausoliel v. Brown, 15 La. Ann. 543.

[h] (N. Y. 1888) An acquittal in a prosecution for assault and battery will not bar the prosecutor from maintaining a civil action for damages.—Rosenberg v. Salvatore (City Ct. N. Y.) 1 N. Y. Supp. 326.

[i] (N. Y. 1892) An acquittal on a criminal prosecution for willfully cutting trees from plaintiff's land, brought under Pen. Code, § 654, providing that a person who willfully destroys or injures real property of another may be punished, etc., and that, in addition, the owner of the property may recover treble damages, is not a defense to an action to recover such damages.—Von Hoffman v. Kendall, 63 Hun, 628, 17 N. Y. Supp. 713.

[j] (N. C. 1888) A civil action to recover money which plaintiff alleges defendant, as his agent, has collected, and neglected to pay over to him, is not affected by the acquittal of defendant on an indictment for the alleged breach of trust instituted by plaintiff in another state.—Powers v. Davenport, 101 N. C. 286, 7 S. E. 747.

[k] (Pa. 1861) A public prosecution for the theft does not supersede or in any way control the private action of trover for the value of the thing stolen; and, as the person wronged by the theft is not chargeable with the conduct of the prosecution, he cannot be affected by the result, even though it be a verdict of acquittal.—Hutchinson v. Merchants' & Mechanics' Bank of Wheeling, 41 Pa. (5 Wright) 42, 80 Am. Dec. 596.

[l] (Pa. 1886) The owner of stolen goods may maintain an action for them against a person in whose possession they are found, notwithstanding the fact that such person, on an indictment in the quarter sessions, was acquitted of the charge of having knowingly received them from the hands of the thief.—Rohm v. Borland, 7 Atl. 171.

[m] (Pa. 1894) The fact that a debtor has been tried for and acquitted of a criminal offense growing out of the transactions set forth in the complaint on which the warrant of arrest was issued is no ground for discharge.—Morch v. Raubitschek, 159 Pa. 559, 28 Atl. 369, 33 Wkly. Notes Cas. 567.

[n] (Tenn. 1868) Where a clerk was discharged for embezzlement, and indicted and acquitted, and sued for his services, a replication that plaintiff was indicted and acquitted of such charge is bad to a plea setting up the embezzlement as a bar, as such acquittal is not evidence in a civil action.—Massey v. Taylor, 45 Tenn. (5 Cold.) 447, 98 Am. Dec. 429.

[o] (Tenn. 1889) An acquittal of a railroad company on an indictment for failure to repair a bridge over a highway is no bar to a bill by the county for a mandatory injunction requiring the company to maintain the bridge, and to repay the county the expense of rebuilding it.—Dyer County v. Chesapeake, O. & S. W. R. Co., 87 Tenn. (3 Pickle) 712, 11 S. W. 943.

[p] (Tex. 1883) A verdict of not guilty in a criminal prosecution for an assault is not admissible in defense to an action for damages for the assault.—Shook v. Peters, 59 Tex. 393.

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[q] (Tex. 1890) The servant's acquittal on a criminal prosecution for the embezzlement, to which proceeding the master was not a party, will not affect the master's right to contest the question of the servant's innocence in an action brought by the latter to compel the restoration of his property; and the record of the criminal prosecution is inadmissible as evidence of the servant's innocence.—Landa v. Obert, 78 Tex. 33, 14 S. W. 297.

[r] (Eng. 1901) An order of quarter sessions quashing a bastardy order is not a bar to an action for seduction by the employer of the woman who had obtained the bastardy order.—Anderson v. Collinson, 70 Law J. K. B. 620, [1901] 2 K. B. 107, 84 Law T. 465, 49 Wkly. Rep. 623.

### II. Action by the Government.

[a] (U. S. 1886) When an acquittal in a criminal prosecution in behalf of the government is pleaded or offered in evidence by the same defendant in an action against him by an individual, the rule of autrefois acquit does not apply. It is otherwise, however, when the party suing as last mentioned is the government itself.—Coffey v. United States, 116 U. S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684.

[b] (U. S. 1897) An acquittal of a person indicted under Rev. St. § 2461, for taking timber from public lands, is not a bar to a civil action against him by the United States to recover the value of such timber, as the civil case turns wholly upon the issue of ownership, and does not involve any question of criminal intent, or of forfeiture for prohibited acts. 64 Fed. 667, 12 C. C. A. 451 (1894), affirmed.—Stone v. United States, 167 U. S. 178, 17 Sup. Ct. 778, 42 L. Ed. 127.

[c] (U. S. 1896) The acquittal under an indictment for making false returns, as postmaster, for the purpose of increasing his compensation, is not a bar to an action on the bond of defendant, as postmaster, for the amount found due the government from defendant, on the adjustment of his accounts, as shown by the same returns.—United States v. Jaedicke (D. C.) 73 Fed. 100.

[d] (U. S. 1905) Where defendant was acquitted in a criminal prosecution for causing to be transported certain casks containing bottled beer falsely marked as containing bottled soda water, such acquittal was a bar to the subsequent maintenance of an action by the United States to forfeit the property and recover a penalty for the same act imposed by Rev. St. § 3449 [U. S. Comp. St. 1901, p. 2277].—United States v. Seattle Brewing & Malting Co. (D. C.) 135 Fed. 597.

[e] (Mo. 1905) An acquittal in a criminal prosecution against a merchant for the alleged violation of a town ordinance prohibiting a person from engaging in the business of a merchant without obtaining a license was no bar to a subsequent civil action to recover a penalty for violating such ordinance.—Town of Canton v. McDaniel, 188 Mo. 207, 86 S. W. 1092.

[f] (Vt. 1900) Judgment, in a criminal case by the state against C., that certain liquors were not kept at a certain date with intent to dispose of them unlawfully, is res judicata, as to the intent at that time, in a proceeding by the state to condemn the liquor, though one proceeding is criminal, and the other civil, and though the second is in rem; it being, as to C., on his coming in as claimant, a proceeding inter partes.—State v. Intoxicating Liquors, 72 Vt. 253, 47 Atl. 779, 82 Am. St. Rep. 937.

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(149 Fed. 704.)

## COMMERCIAL PUB. CO. v. SMITH.

(Circuit Court of Appeals, Sixth Circuit. January 8, 1907.)

No. 1,557.

1. LIBEL—ACTION—DEFENSES.

The publication of a statement that a person has been arrested on a criminal charge is not actionable if the statement is true, but if there is added to it by way of comment words which amount to an accusation that the charge is true, or comment which assumes the guilt of the person arrested, by headlines or otherwise, the mere fact that the person was arrested on the charge stated is no justification for the words imputing guilt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 148.]

2. SAME—CONSTRUCTION OF PUBLICATION—QUESTION FOR JURY.

A publication must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it, and the whole, including display lines, should be read and construed together, and its meaning and signification thus determined. When so read, if it is so unambiguous as to reasonably bear but one interpretation, it is for the judge to say whether it is defamatory or not; but if it is capable of two meanings, one of which would render it libelous and actionable and the other not, it is for the jury to say, under all the circumstances surrounding its publication, including extraneous facts admissible in evidence, which of the two meanings would be attributed to it by those by whom it might be read.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 357-359.]

3. SAME.

An item published by defendant in its newspaper, under the heading "Murderer Arrested," stated that a sheriff had arrested the plaintiff, who was wanted in another state for the murder of a man, the incentive being robbery; that rewards had been there offered for plaintiff's arrest; that he did not deny being the man wanted, but claimed that he did not do the killing. In an action for libel because of such publication, the declaration admitted that plaintiff was arrested as therein stated, and alleged by innuendo that the article charged plaintiff with murder, and that rewards had been offered for his arrest, which statements were false and untrue; that plaintiff had been injured thereby, etc. *Held*, that the question whether the article would be understood by readers to so charge, and was therefore libelous, was one for the jury, and that the court erred in charging that it was libelous per se.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 357, 358.]

In Error to the Circuit Court of the United States for the Western District of Tennessee.

E. E. Wright, for plaintiff in error.

H. D. Minor, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. Action for libel. Jury, and verdict and judgment for plaintiff. Defendant has sued out this writ or error. The alleged libelous publication consisted in the publication in the newspaper published by the plaintiff in error of a special dispatch from its

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own special correspondent at Augusta, Ark., in words and figures as follows:

"Murderer Arrested.

"Augusta, Ark., Feb. 10th.—Sheriff Marshal Patterson arrested Fred Smith, camped in a tent ten miles north of Augusta, on White river. Smith is wanted at Kennett, Mo., for killing old man F. E. Porch, the incentive being robbery. The state of Missouri offered $300, the county $200, and the citizens of Malden $600, for Smith's arrest. Smith does not deny being the man wanted, but claims he did not do the killing."

The declaration, by innuendo, averred that the meaning of the said publication was:

"That the said plaintiff was a murderer; that he had murdered an old man named F. E. Porch for the purpose of robbing him; that a reward was being offered for the arrest of said plaintiff; and that he, the said plaintiff, on being arrested, did not deny that he was the man wanted."

The declaration admitted that so much of the item as stated that the plaintiff had been arrested by Sheriff Patterson at the time and place stated was true, but that the statement that "a murderer had been arrested, and that the said plaintiff was 'wanted at Kennett, Mo., for killing old man Porch, the incentive being robbery' and that 'the state of Missouri had offered $300, the county $200, and the citizens of Malden $600,' for the arrest of plaintiff, and that the plaintiff did not deny being the man wanted," were false and untrue, and that by this false publication plaintiff had been greatly injured, etc.

The defendant interposed three pleas: First. Not guilty. Second. That the publication did not refer to the plaintiff but to one Fred Smith, a different individual. The third plea was in these words:

"For further plea, filed by leave of the court, the defendant says that the plaintiff was arrested by Sheriff Marshal Patterson in a tent near Augusta, Arkansas, on a charge of murder, and under the belief by the sheriff that he was guilty of that offense, and that the plaintiff did claim that he did not do the killing for which he was arrested. The substance of the publication complained of is that the plaintiff was arrested on the charge of murder, and that he claimed that he was innocent of that charge. The sheriff may have made a mistake in the matter. The defendant says the article complained of did not state that the plaintiff is guilty of murder, nor does the language used bear that meaning. It only says and means, in substance, that the plaintiff was arrested on the charge of murder. Wherefore pleads this special justification as to the truth of the words herein referred to in bar and defense of this action."

The case turned below upon the sufficiency of this third defense, and must turn here upon the question as to whether the meaning of the item was for the jury. In respect of the construction and interpretation of the item, the court said:

"I charge you, gentlemen of the jury, that the publication set out in the declaration is libelous per se—that is, it is actionable on its face—and if you believe from a preponderance of the evidence in the case that the defendant published the article, and if you further believe that it was published of and concerning the plaintiff, and that it was untrue, then the plaintiff would be entitled to a verdict at your hands."

He denied a request to charge that it was the province of the jury to determine the meaning of the objectionable item, and that if they should find that the article or item only conveyed to those who read it

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"the meaning that the plaintiff was arrested by the sheriff on the charge of murder" etc., that the plaintiff could not recover if they should find as a fact that the plaintiff had been arrested by the sheriff upon a charge of murder, although the sheriff might have made a mistake in so doing. The publication of the fact that one has been arrested, and upon what accusation, is not actionable, if true. But a newspaper has no greater justification for the publication of defamatory matter than pertains to any private person. The defense against an action for writing or saying of one that he has been arrested upon a particular charge is that the fact is true. But if to this fact there is added, by way of comment, words which amount to an accusation that the charge is true, or comment which assumes the guilt of the person arrested, by headlines or otherwise, the mere fact that the person was arrested upon the charge stated is no justification for words imputing guilt. Newell on Slander & Libel, p. 574; Usher v. Severance, 20 Me. 9, 11, 37 Am. Dec. 33; McBee v. Fulton, 47 Md. 403, 28 Am. Rep. 465.

The plaintiff's case depended upon whether the publication in question went beyond a mere statement of the fact of his arrest upon the charge of murder. By innuendo he placed an interpretation upon the words printed, which, if established, signified that the plaintiff was guilty of the murder of Porch, and was the person for whom the rewards had been offered as a fugitive from justice.

The defendant's third plea was, in effect, an admission of the publication, but a denial that the words printed of him, when read together, meant more than that he had been arrested under a charge of being the man who had murdered Porch, and for whom rewards were offered. If this is the meaning which is fairly attributable to the article by those to whom it was addressed, the plaintiff's case must fail. In such case the article would be justified by the truth of the only facts stated or implied, to wit, that the plaintiff had been arrested upon the charge of having murdered Porch with intent to rob him. The issue presented by the defendant's third plea and the request for a special charge, referred to above, was as to the meaning of the article published concerning the plaintiff. The court, in effect, instructed the jury to find for the plaintiff by saying to them that the publication was "actionable on its face," and that if it was published of and concerning the plaintiff and untrue, then the plaintiff would be entitled to a verdict. This was not excepted to. But the special request proffered at the conclusion of the charge was in direct opposition. By it the court was asked to submit to the jury the meaning of the article, with an instruction that, if they found that the item "only charged or conveyed to those who read it the meaning that the plaintiff was arrested by the sheriff on the charge of murder, and that the plaintiff claimed that he was not guilty thereof, that these words, under such a meaning, would not be libelous and actionable, if you find that the plaintiff was in fact arrested by the sheriff for murder, although the sheriff made a mistake by so doing." This charge was denied. This was error. A publication claimed to be defamatory must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it. So the whole item, including display lines, should be read and construed together, and its meaning and signification thus de-

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termined. When thus read, if its meaning is so unambiguous as to reasonably bear but one interpretation, it is for the judge to say whether that signification is defamatory or not. If, upon the other hand, it is capable of two meanings, one of which would be libelous and actionable and the other not, it is for the jury to say, under all the circumstances surrounding its publication, including extraneous facts admissible in evidence, which of the two meanings would be attributed to it by those to whom it is addressed or by whom it may be read. Newell on Slander & Libel, § 290; Townshend on Libel & Slander, §§ 281, 286; 13 Enc. Pleading & Practice, 106; Sturt v. Blogg, 10 Q. B. 908; Capital & Counties Bank v. Henty & Sons, 7 App. Cases 741, 744; Watson v. Nicholas, 6 Humph. (Tenn.) 174; Bank v. Bowdre Bros., 92 Tenn. 723, 740, 23 S. W. 131; Dexter v. Taber, 12 Johns. (N. Y.) 239; Mosier v. Stoll, 119 Ind. 244, 20 N. E. 752; and Twombly v. Monroe, 136 Mass. 464, 468.

The plaintiff by innuendo assigned a meaning to the news item alleged to be libelous, which, if established, would attach a meaning and signification imputing to the plaintiff an indictable crime of heinous character. In Cunningham v. Underwood, 116 Fed. 803, 807, 53 C. C. A. 99, we said that:

> "When antecedent words are capable, as a matter of law, of being understood in more than one sense, it is the office of an innuendo to designate that meaning which the plaintiff proposes to establish as the meaning intended by the defendant and understood by those who heard or read them."

But the court relieved the jury of all discretion in the matter of the signification of the printed words by the instruction set out and by the refusal to give the instruction asked. In Sturt v. Blogg, cited above, and quoted with approval by Lord Selbourne in Capital & Counties Bank v. Henty, cited above, it was said by Wilde, C. J.:

> "It is the duty of the judge to say whether a publication is capable of the meaning ascribed to it by an innuendo; but where the judge is satisfied of that, it should be left to the jury to say whether the publication has the meaning ascribed to it."

The publication here involved was not so free from reasonable doubt as to its meaning and signification as to justify the learned circuit judge in ascribing to it, as matter of law, the signification sought to be put upon it by the innuendo. There was room for the jury, taking into consideration the display line and all other parts of the dispatch, and all the circumstances in evidence, to conclude that it would only convey to the readers of the paper the information that the plaintiff had been arrested under the charge of being the person accused with the murder of Porch, and for whom a reward was offered, and that plaintiff had admitted that he was the person wanted by the sheriff who made the arrest, but that he denied that he was the murderer of Porch.

The case is to be retried. This fact makes it proper that we should express no opinion as to whether this meaning is the most natural interpretation, or one which imputes to the plaintiff the crime of murder.

Judgment of the court below reversed, with direction to order a new trial.

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(149 Fed. 708.)

MERCHANTS' NAT. BANK OF TOLEDO, OHIO, v. COLE.

(Circuit Court of Appeals, Sixth Circuit. January 8, 1907.)

No. 1,560.

1. APPEAL—MASTER'S FINDINGS—REVIEW.

In a case brought to the Circuit Court of Appeals, on appeal from the judgment of the trial court after a hearing of the case on the merits, and not on exceptions to the findings of a master, the appellate court was entitled to review the case independent of the master's findings.

2. BANKRUPTCY—ACT OF BANKRUPTCY—FRAUDULENT CONVEYANCE.

Decedent on March 23, 1898, executed a guaranty of payment of all her sons' notes to a bank and all renewals and new loans made by the bank to them. Decedent was a woman of advanced years, without special business experience. The bank then extended further credit to the sons, and during the five succeeding years they took care of their paper as it matured; it appearing that over $250,000 of their paper was discounted by the bank during that period. On September 2, 1903, decedent owned no personal property, except household goods, but owned real estate of considerable value, and had no creditor, except N., to whom she owed a large sum, other than her indebtedness on the guaranty, and on that day she conveyed her real estate to N. in payment of her indebtedness to him. At the time of this conveyance none of the outstanding notes discounted by the bank for her sons, had matured, and it did not appear that she had any knowledge of her liability on the guaranty. *Held*, it was not shown that the conveyance to N. was made with intent to hinder, delay, and defraud her creditors, or with intent to prefer N. over her other creditors, so as to constitute an act of bankruptcy.

Appeal from the District Court of the United States for the Western Division of the Northern District of Ohio.

C. Brown, for appellant.

A. L. Smith and G. W. Kinney, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This is an appeal from a judgment of the court below refusing to adjudge Lucy A. Cole a bankrupt. The act of bankruptcy relied on in the petition was the conveyance by Lucy A. Cole, on September 2, 1903, of all her real estate to her creditor, John T. Newton. It was charged she did this with intent to hinder, delay, and defraud her creditors, and that, being then insolvent, she did it with intent to prefer Newton over her other creditors. The answer denies she was insolvent at the time she made the conveyance, and denies that she made it either with intent to hinder, delay, or defraud her creditors, or with intent to prefer Newton over her other creditors. The petition was filed June 1, 1904, the answer June 28, 1904, and on December 23, 1904, the court, against the objection of the respondent, ordered the cause to be referred to a master, who was to have the powers of masters in chancery, under the rules of equity, to take "the proofs offered by the parties upon the issue made herein as to the insolvency of said Lucy A. Cole, and report the same to the court, with his findings of fact and conclusions of law thereon."

Beginning on April 10, 1905, the master took certain testimony, and

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on June 9, 1905, submitted his report, in which, after stating his findings of fact, he reported as his conclusions of law that on September 2, 1903, Lucy A. Cole was insolvent, and made the conveyance in question with intent to prefer one of her creditors over others, and to hinder, delay, and defraud her other creditors. To this finding, exceptions were taken and the matter was heard by the court below. The character of this hearing is in dispute. A careful examination of the record satisfies us that the court acted twice upon the matter—first upon the exceptions, and then upon the entire case. The cause was referred to the master solely upon the issue of the insolvency of the alleged bankrupt at the time of making the conveyance of September 2, 1903. The master found she was then insolvent. The court overruled the exceptions to this finding and affirmed the report in this respect. Having done this, the court went on and heard the case upon the petition and answer and reply and the evidence, and 'upon a consideration of the proofs in said cause and arguments of counsel the court found that the facts set forth in said petition were not proved, and that the said Lucy A. Cole was not a bankrupt as alleged in said petition." Thereupon the court dismissed the petition, from which this appeal was taken.

After the entry of this judgment, there was an application by the petitioner for the reopening of the case and leave to offer further proof, which was denied; the court saying:

"It is true that the court inadvertently treated this as passing upon the report of the master, when, in fact, it came originally before the court. The fact is that the court considered the case as if originally before it, and disposed of it on the merits."

From the record it appears that the case is here, not simply upon the testimony taken before the master, but also upon a certificate of evidence made by the court setting forth certain stipulations, admissions, and testimony produced before the court which were not before the master. We have gone into this matter in some detail, because the point is pressed by counsel for the petitioner that, since the defendant did not take a cross-appeal, the findings of the master are binding here. The case is here, not upon exceptions, either primarily or secondarily, to the master's findings, but upon an appeal from the judgment of the court below, after a hearing of the case upon the pleadings and evidence—in other words, upon the merits—so that we are in no wise hampered by the master's findings and conclusions, but the whole case is before us. Ridings v. Johnson, 128 U. S. 212, 218, 9 Sup. Ct. 72, 32 L. Ed. 401; Elliott v. Toeppner, 187 U. S. 327, 334, 23 Sup. Ct. 133, 47 L. Ed. 200; Loveland on Bankruptcy (3d Ed.) § 326.

Coming to the merits, it appears that on March 29, 1898, F. E. Cole and G. H. Cole were engaged in the contracting business, paving streets and constructing sewers in Toledo, Ohio, and paving streets in Lima, Ohio. They had from time to time borrowed money from the petitioner, the Merchants' National Bank of Toledo, to aid them in their business, and at that time owed the bank $13,200, represented by seventeen promissory notes, all executed during January, February, and March, 1898. Lucy A. Cole was the mother of the Cole

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brothers, and on March 29, 1898, she signed the following paper, prepared by the cashier of the bank and presented to her by one of her sons, G. H. Cole:

"March 29, 1898.

"I hereby guarantee the payment of all notes of F. E. and G. H. Cole held by the Merchants' National Bank; also all renewals of the same, and any new loans made to either F. E. Cole or G. H. Cole by the said bank.

"Lucy A. Cole."

Lucy A. Cole was then a woman advanced in years, who, while the owner of certain real estate in Toledo, was not engaged in business, and was apparently without special business experience. Subsequent to the giving of this guaranty, the Cole brothers extended their business operations, taking contracts in Tennessee and in Philadelphia, and the Merchants' National Bank enlarged their credit as needed from time to time, until their indebtedness in the fall of 1903 aggregated over $40,000. During these five years, from 1898 to 1903, the Cole brothers took care of their paper as it matured, either paying or renewing the same, and the evidence shows that over $250,000 of their paper had been discounted in this bank during that period. Of the outstanding notes of the Cole brothers, only one matured on September 2, 1903, a note for $6,000. The others matured later. On this day Lucy A. Cole owned no personal property, except household goods, but owned real estate of considerable value in Toledo, and, so far as appears from the records, had no creditor, except John T. Newton, to whom she owed a large sum, unless she was then liable to the Merchants' National Bank upon her guaranty. On this day she deeded all her real estate in Toledo to Newton.

The court below took the view that the testimony did not make out a case of intent on the part of Mrs. Cole, either to defraud her creditors or to prefer one over the others, and it reached its conclusion because the testimony did not satisfy it that Mrs. Cole knew, at the time she made the conveyance, that she was insolvent, or that she had any creditor other than Newton. We can find no good ground in the record to withhold our approval of these conclusions. Mrs. Cole was not a business woman. She signed the guaranty at the request of one of her sons, understanding, as she testified, that it referred solely to the business her sons were then carrying on in Toledo. Some years passed. They extended their operations to Tennessee and Philadelphia, the bank at the same time enlarging their line of credits; and, according to the testimony, the guaranty was never mentioned to Mrs. Cole, either by her sons or by any officer of the bank. It is not an unreasonable inference that this paper, which had been prepared at the bank and signed by her on request, had passed from her mind. It naturally would, for the Toledo business—the notes held by the bank when the guaranty was given, the renewals thereof, and the new notes made in connection therewith—all had been settled or taken care of. The only one who was calling his claim as a creditor to her attention on or shortly before September 2, 1903, was Newton, to whom she had obligated herself in behalf of her sons, and whom she had promised to make a conveyance of her real estate in satisfaction of his claims, whenever he might demand it. She states in the record that she did make the

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conveyance in August, 1903, and that the conveyance of September 2, 1903, was made for the purpose of correcting the description of her premises in the deed made in August. There was nothing in the fact that Newton demanded the conveyance in August, and afterwards, on September 2d, requested another conveyance to correct the first. There was nothing in this to put her upon notice that her sons were, or were about to be, in trouble with the bank, or that she would be involved on account of the old guaranty.

It is not necessary for us to pass upon the nature of the guaranty; but, conceding it was still in force—a thing we are not to be taken as deciding—there was certainly no liability as against her until her sons had failed to pay one of the notes or loans which the guaranty secured, and there could have been no failure of that kind until the close of September 2, 1903, when the note of $6,000 fell due and became payable, the other outstanding notes not maturing until later. No notice of the fact that her sons had failed, or would probably fail, to meet any of their obligations to the bank, was brought home to her on or before September 2, 1903, when she made this conveyance. As the case stands in the record, she had knowledge on this day of but one creditor, Newton, to whom she made a conveyance at his demand in fulfillment of her agreement. She had a right to pay him, and she could not have made the transfer with intent to prefer him, unless at the time she had known, or had reason to know, of the existence of other creditors. And this is true of the intent to hinder, delay, and defraud her creditors. That intent must be established by proof, fraud must be shown, and the good faith of the transaction must be successfully impeached. Lansing Engine & Boiler Works v. Ryerson, 128 Fed. 701, 703, 63 C. C. A. 253. Now, this has not, in our opinion, been done. The testimony goes no further than to cast a suspicion.

The judgment is affirmed.

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(149 Fed. 711.)

## UNION NAT. BANK OF KANSAS CITY, MO., v. NEILL.

(Circuit Court of Appeals, Fifth Circuit. December 11, 1906.)

No. 1,546.

1. PARTNERSHIP—TRADING PARTNERSHIP—AUTHORITY OF PARTNER—BORROWING MONEY.

In an ordinary trading partnership, a partner has implied authority to borrow money on the credit of the firm, to draw, and accept, make, and indorse bills of exchange and notes, in the name of the firm.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, §§ 241-255.]

2. BILLS AND NOTES—BONA FIDE PURCHASER—AUTHORITY OF MAKER.

Though a member of a trading partnership has no implied power to sign the firm name as an accommodation indorser of a note, yet, if he does so, his unauthorized act constitutes no defense to the firm as against a bona fide purchaser for value in due course; the paper being such as to be subject to the law merchant.

3. SAME—BONA FIDE PURCHASER—REQUISITES.

Where the holder of negotiable paper acquired it before maturity from another, who was apparently the owner, and gave a consideration there-



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for, he obtained a good title, though he had knowledge of facts and circumstances that would cause him or a man of ordinary prudence to suspect that the person from whom he obtained it had no interest therein or authority to use it for his own benefit, and though by ordinary diligence he could have ascertained such facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 869.]

4. SAME—NOTICE OF SURETYSHIP.

Where a note when presented to petitioner for discount was signed on its face by three persons, the fact that the name of a partnership subsequently adjudged a bankrupt appeared as the second signer was not notice to petitioner that the firm signed only as surety for the first signer.

5. SAME.

Where a series of notes discounted by petitioner were all signed by three persons, a partnership which subsequently became a bankrupt being the second signer, the notes on their face did not indicate a contract of suretyship by which the second signer on being compelled to pay the entire note did so to the extent of two-thirds thereof as surety for the others.

6. SAME—JOINT AND SEVERAL LIABILITY.

Where a series of notes were signed by three persons, the second signer being a firm which subsequently became a bankrupt, the firm's contract as principal was to pay the entire amount of the notes, and this was not changed by the fact that other signers had made the same promise.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 542.]

Appeal from the District Court of the United States for the Western District of Texas.

For opinion below, see 143 Fed. 553.

M. L. Crawford (W. I. Ford and W. L. Crawford, Jr., on the brief), for appellant.

C. A. Keller, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. The appellant presented to the referee in bankruptcy for allowance against the bankrupt firm of A. F. Hardie & Co. 12 notes for $2,500 each, aggregating $30,000. The claim was at first allowed. Afterwards, on motion of the appellee, it was disallowed by the referee and expunged from the list of claims. The appellant excepted to the disallowance of its claim, and presented to the district court its petition to review the decision of the referee. The district court affirmed the referee's decision, and the case is brought here by appeal. The 12 notes are all alike, except as to the date of maturity, and are in the following form:

"$2,500.00. Dallas, Texas, February 16, 1905. April 10, 1905, after date we promise to pay to the order of Spence and Leonard Hardie twenty-five hundred dollars, at Dallas, Texas, with interest from date until paid at six per cent per annum. If this note is not paid at maturity and is collected by suit or attorney, we further promise to pay ten per cent. additional on principal and Interest for attorney's fees. Value received.

"Hardie Rose Co.
"(By A. F. Hardie, Pres.)
"A. F. Hardie & Co.
"A. F. Hardie."

The firm of A. F. Hardie & Co. was composed of A. F. Hardie, James M. Hardie, and Max Kaliski. It was a trading partnership,

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engaged at the time the notes were made and negotiated in the purchase and sale of merchandise at San Antonio, Tex. The notes in question were signed in the firm name in the handwriting of James M. Hardie. Each note was indorsed on the back as follows:

"Spence Hardie, Leonard A. Hardie. Notice and protest waived. Pay Union National Bank, Kansas City, Mo., or order, Swofford Bros. Dry Goods Co. By J. J. Swofford, Pt. Notice & protest waived. Spence Hardie, Leonard A. Hardie."

The Swofford Bros. Dry Goods Company had for a long time kept an account at the appellant bank, and the bank was in the habit of discounting commercial paper for the company. On March 30, 1905, the bank discounted for the company the 12 notes in question, paying for them $30,206.80. This amount was placed in the bank to the credit of Swofford Bros. Dry Goods Company, and shortly afterwards checked out by it. It is not shown in the record how or from whom the Swofford Bros. Dry Goods Company received the notes, nor is it shown what hands they passed through before they came to the Swofford Bros. Dry Goods Company. The District Court found that no proceeds of the notes ever came to the firm of A. F. Hardie & Co., and that Max Kaliski, who was an active member of the firm and who furnished a large part of its capital, received no benefit from the notes, and did not know of their execution.

It was clearly proved, and found as a fact by the referee and the District Court, that the appellant bank purchased the notes, paying for them their full value in cash before their maturity, and that it had no notice of any infirmity in them, unless such infirmity is disclosed by the notes themselves. The sole question decided below, and to be decided here, is whether or not the appellant is an innocent purchaser without notice of the 12 notes. As they were purchased before maturity and full value paid for them, and as the bank had no notice of any extrinsic fact tending to show any infirmity in the notes, it must be held to be an innocent purchaser without notice, if the notes, in the form in which they appear, are prima facie legal and binding on the firm of A. F. Hardie & Co. The question to be considered, therefore, relates to the form of the notes. Do they convey notice to the purchaser that the transaction was not one in the usual and ordinary course of borrowing money or of other business for the benefit of the partnership? It was contended by the appellee, and held by the lower court, that "the name of the Hardie-Rose Company appearing as the first joint maker on the face of the notes, with the partnership name of A. F. Hardie & Co. immediately following, imparted notice to third parties that the transaction was not one in the usual and ordinary course of business," and that the notes, therefore, showed on their face that they did not prima facie bind the partnership. It is asserted in the briefs of counsel, and in the opinion of the trial court, that no case has been found decisive of the precise question.

It is elementary that the liability of partners, as such, depends upon the principle of agency; that any contract made by a partner for the partnership, within the actual scope of the agency, is binding upon the firm; that in an ordinary trading partnership a partner has implied

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authority to borrow money on the credit of the firm, to draw and accept, make, and indorse bills of exchange and promissory notes in the name of the firm; and that, even when the partner exercising such power abuses his trust for his own pecuniary advantage and to the injury of his firm, his copartners will be bound, unless the other party to the contract is chargeable with notice of the facts. It is well settled, however, that the power of a partner, implied from the contract of partnership, to act as agent for his copartners and to bind them by contracts in the firm name, is limited to transactions within the scope of the partnership business. Applying this limitation, it has been held that the power is not implied to sign the firm name as an accommodation indorser (Lemoine v. Bank of North America, 3 Dill. 44, Fed. Cas. No. 8,240), nor to make contracts of guaranty or suretyship. Bank v. Alden, 129 U. S. 372, 9 Sup. Ct. 332, 32 L. Ed. 725; Foot v. Sabin, 19 Johns. (N. Y.) 154, 10 Am. Dec. 208; Mauldin v. Bank, 2 Ala. 502; Brettel v. Williams, 4 Exch. (W. H. & G.) 623. But where such unauthorized contract is made, if the paper is of such a character as to be subject to the law merchant, an innocent indorsee acquiring it in the usual course of trade for value and before maturity can maintain an action against the partnership. Kimbro v. Bullitt, 22 How. 256, 16 L. Ed. 313; National Exchange Bank v. White (C. C.) 30 Fed. 412; 1 Daniel's Negotiable Instruments (5th Ed.) § 368, and cases there cited. The statement of these principles shows that the correct decision of the case at bar turns on the question as to whether or not the appellant is an innocent purchaser.

There are conflicting decisions of the state courts on what is sufficient to put the purchaser of negotiable paper on notice of facts that deprive him of the character of an innocent purchaser. Here we are, of course, governed by the law as settled by the federal courts. It is held by this court, speaking by Pardee, Circuit Judge, that since the leading case of Goodman v. Simonds, 20 How. 343, 15 L. Ed. 934, one who acquires mercantile paper before maturity from another who is apparently the owner, giving a consideration for it, obtains a good title, though he may know facts and circumstances that would cause him to suspect, or would cause one of ordinary prudence to suspect, that the person from whom he obtained it had no interest in, or authority to use it for his own benefit, and though by ordinary diligence he could have ascertained those facts. Bank of Edgefield v. F. C. M. Co., 52 Fed. 98, 2 C. C. A. 637, 18 L. R. A. 201; Swift v. Smith, 102 U. S. 442, 26 L. Ed. 193. In Magee v. Badger, 34 N. Y. 247, 249, 90 Am. Dec. 691, the court held that the purchaser of negotiable paper "is not bound, at his peril, to be upon the alert for circumstances which might possibly excite the suspicions of wary vigilance. He does not owe to the party who puts negotiable paper afloat the duty of active inquiry to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence." This case is cited approvingly in Brown v. Spofford, 95 U. S. 474, 478, 24 L. Ed. 508. It is not, therefore, a question as to whether the notes on their face would excite the suspicion of the vigilant, or wheth-

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er the appellant was negligent in not making inquiries as to the authority of the signing partner to bind the firm by the making of the notes; but the question is: Do the notes, on their face, show an illegal and unauthorized use of the partnership name and credit?

In Gelpcke v. City of Dubuque, 1 Wall. 175, 203 (17 L. Ed. 520), the court said:

"When a corporation has power, under any circumstances, to issue negotiable securities, the bona fide holder has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper."

The principle announced seems to us equally applicable to the negotiable notes of a partnership. If a trading partnership, under any circumstances, has the implied right and power to make promissory notes of the kind and in the form in proof, one to whom they are offered in the market has a right to presume that they were issued under the circumstances which gave the requisite authority. National Exchange Bank v. White (C. C.) 30 Fed. 412, 416; 1 Bates on Partnership, § 352.

The alleged inherent defect that, it is claimed, imparted notice of the illegality of the notes as a partnership transaction, that is first urged, is that the name of the Hardie-Rose Company appears as the first joint maker, and that the name of the partnership, A. F. Hardie & Co., immediately follows. The idea is that the partnership, being the second signer of the note, must be the surety of the first signer. There is no question about the authority of a partner in a trading firm having the authority to use the firm name to raise money on the partnership's negotiable paper. There is no doubt, so far as the objection now considered is concerned, about his having the right to accept others as the sureties of the firm on such note. It follows that, if the notes in question were signed by A. F. Hardie & Co. only, their validity would be unquestionable; or if they were made by A. F. Hardie & Co. as principal, and the other two joint makers as sureties, they would not be subject to the objection now considered. What, then, is the alleged infirmity which is so potent as to carry notice? It is simply the fact that of the three names that of the partnership is second. This can be an infirmity only upon the hypothesis that a presumption arises that the first signer of a joint note is principal and the others are sureties. No authority is cited showing that such presumption arises from the order in which the signatures are attached to a joint note. In Summerhill v. Tapp, 52 Ala. 227, it was held, Brickell, C. J., speaking for the court, that the fact that the name of one of several makers of a note was first in the order of signatures did not cause the "presumption of suretyship" to arise. On the contrary, the court held that "all who sign a promissory note, joint, or joint and several on its face, are esteemed joint, or joint and several promissors, unless the note expresses that they bear another relation." In Paul v. Berry, 78 Ill. 158, 160, the court said:

"As between the makers, there arises no presumption simply from the note or the judgment that the first signer, or any other number less than the whole,

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is or are to be treated as principal or principals, and the others as co-sureties, but it rests in evidence, to be introduced allunde the note and judgment, to determine what relation they sustain towards each other."

Brandt says (1 Brandt on Suretyship & Guaranty, § 33):

"Where several persons execute a promissory note and there is nothing on its face to show their relations to each other, there is no presumption from the order in which they sign that any, or which, of the signers are sureties."

Where the words of a note show it to be a joint obligation, and it contains no word to the contrary, and it is signed by several makers, two, three, or ten, there is nothing in the mere order of signing which creates any presumption of suretyship. Where there are three joint makers, as in this case, it would be just as reasonable to presume that the first two were principals and that the third was a surety as it is to presume that the first one is the only principal and the second and third are sureties. If we once abandon the words of the contract and resort to presumptions based on the order in which the makers' names are affixed to the note, we would find difficulty in applying the doctrine to notes signed by varying numbers of makers.

In cases where evidence is admissible to show that a joint maker was in fact a surety, it would be admissible without regard to whether the alleged surety was the first, second, or third signer; but no question as to other evidence than the notes themselves arises in this case.

The learned attorney for the appellee argues that the fact that the attorneys for neither party have been able to find a single decision in which it was held that a member of a firm has a right to sign a joint note with others and to bind his partners is "incontrovertible evidence that such a transaction is unusual and beyond the ordinary scope of the partnership business." The want of authority on the exact point probably does not come from the fact that partnerships do not join others in making negotiable joint, or joint and several obligations, but it springs rather from the fact that those engaged in mercantile business and litigation are of the opinion that the right of a partner in a trading partnership to execute negotiable paper is not limited to instruments in which he, for his firm, is the sole maker or drawer. Many cases, we think, may be found in which the partnership is sued on such joint paper; no question being raised as to its having any infirmity on its face. Faler v. Jordan, 44 Miss. 283, was a suit on a note made by Daniel McLaurin, W. I. Draughn, and the firm of Faler, McLaurin & Co. A copy of the note is not given in the report of the case, but it appears clearly that the firm of Faler, McLaurin & Co. was the last of the three signers. The partnership was composed of Cornelius McLaurin and Faler. Neither of the first two signers of the note were members of the firm. Faler, a member of the firm, which firm was the third signer, interposed the defense that he did not sign the note, or authorize another to do so for him, but that the same was signed by some person to bind the firm of Faler & McLaurin as sureties for Daniel McLaurin, without his knowledge or consent. There was no suggestion made in the case that the partnership could not be legally bound by a joint, or a joint and several, note. The court said, citing as authority Winship v. Bank, 5 Pet. 529, 8 L. Ed. 216, that "the pow-

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er of each partner to put the name of the firm to negotiable paper is so essential to the conducting of its business that it is implied from the very existence of the firm"; and the learned court added, speaking, it must be remembered, of a joint promissory note in which the partnership which was sought to be charged was the third signer:

"Whenever a partnership name appears on commercial paper, the firm is prima facie bound, and the onus is on the firm and each member to show that it or he is not liable."

In Van Tine v. Crane, 1 Wend. (N. Y.) 524, suit was brought by the plaintiff as the indorsee of a promissory note made by the partnership of Crane & Platt and one Robert F. Van Tine. The note was joint and several. The suit was brought against the partnership alone, which plead in abatement the nonjoinder of the other maker. The court, in deciding the case, said:

"The note, having been signed by one of the partners in the partnership name, was the note of the firm, and not of the individuals composing it, so far as the remedy to enforce payment was concerned."

There is no hint in the case that the firm could not join in a joint and several note that bound the firm to pay the whole amount of the note. A joint and several note, signed by a partnership and three other makers of the note, was held valid and binding on the partnership for the entire amount of the note in Re Holbrook, 2 Lowell, 259, Fed. Cas. No. 6,588. It is true that in that case the evidence, aliunde the note, showed that the last three signers were sureties, but there is no intimation in the case that the note on its face showed any infirmity arising from the want of power of a partnership to make a joint note.

If the inhibition against joint promissory notes by partnerships is to prevail, the principle would also be applicable to bills of exchange. While the drawer of a bill of exchange is generally a single person, copartnership, or corporation, yet two or more persons may unite in drawing a bill. In such case they become, of course, joint obligors. A person uniting with a drawer or drawers could do so as a surety, and such person is called a "surety drawer." 1 Daniel on Negotiable Instruments (5th Ed.) § 95, and cases there cited. If the principle contended for by the appellee were established as to promissory notes, it would be equally applicable to bills of exchange. It would follow that a partnership could not become a joint drawer of a bill of exchange, and in the event it became a second signer of a bill of exchange the presumption would arise that it was surety for the first signer, and the bill would be, prima facie, not binding on the partnership. This view could not be reconciled with the decision of the Supreme Court in Kimbro v. Bullitt, 22 How. 256, 16 L. Ed. 313. In that case a member of a firm, which, acting by another partner, was a joint drawer and second signer of a bill of exchange, was held liable at the suit of the drawees and acceptors, who paid the bill. It appears in the opinion that the bills were drawn by Morgan McAfee and the firm of Dement, Kimbro & Sons, addressed to Bullitt, Miller & Co. The bills were accepted and paid by the drawees, and suit was brought by them against Kimbro, a member of the firm of Dement, Kimbro

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& Sons. Kimbro defended upon the ground that the principal acting partner of his firm had no power to draw the bills sued on. It did not seem to occur to court or counsel that the firm had no power to become a joint obligor with Morgan McAfee as drawers of the bill, nor that the firm was to be presumed to be the surety of Morgan McAfee, the first drawer, or the drawer whose name was first signed. The court affirmed the judgment of the Circuit Court against Kimbro, holding that a partner in a trading firm has a right, without the consent of his associates, to draw bills of exchange, and that the right of the acceptors who had paid the money to recover from the drawers could not be affected by the fact that one of the drawers had applied the money to an unlawful purpose. If it had been the law that a second signer of a joint bill is to be presumed to be a surety, or that a partner had no right, prima facie, to bind his firm in a joint bill, we cannot believe that these defenses would have been disregarded by the court and counsel.

The learned attorney for the appellee insists that, if these notes do not show that A. F. Hardie & Co. was surety for the whole $30,000, they certainly do show that it was surety for two-thirds of the amount of the notes. The contention is that, treating the notes as joint notes of the three makers, the presumption is that each of the makers received only one-third of the consideration, to wit, $10,000, and that the partnership of A. H. Hardie & Co. therefore became the security of the other two makers for $20,000. The idea is that, as each maker is jointly bound for the whole note, if the first and third signers fail to contribute to the payment of the debt, the second signer, A. F. Hardie & Co., would have to pay all, and that, therefore, the firm is at least security for the other two signers for two-thirds of the debt, and that it follows that the paper comes within the rule against the firm name being used as surety by a partner without the consent of his copartners. This argument, while seemingly sound, avoids the real question. It may be true that a joint note, or a joint and several note, contains, as between the makers, some of the elements of suretyship, in that, if one should fail to pay, another may be required to pay more, or that one, paying all, may require contribution from the others. But such consequences come from occurrences subsequent to the making of the note, and are based on relations between the parties that would have to be shown by evidence other than the notes themselves. No contract of suretyship appears in the note. As between the makers and the payees, there is no element of a contract of suretyship. The payees, or their indorsees, can look to all equally for payment, and the debt is the debt of all. In the case of a joint and several note, any one maker, at common law, could be sued alone for the entire debt. The joint and several note, though written on one piece of paper, is held by the law to be several notes—the separate note of each maker and the joint note of all. 1 Daniel on Negotiable Instruments, § 94. In the jurisdiction where the notes in question were made and were payable, although they are joint and not several in terms, any one of the makers could be sued alone for the entire debt. Rev. St. Texas 1895, § 1203. The notes on their

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face do not constitute an agreement by A. F. Hardie & Co. as principal to pay one-third, and as surety to pay two-thirds, if the two joint makers fail to contribute to their payment. The firm's contract is, as principal, to pay the entire amount of the note. The fact that others make the same promise does not alter the contract of A. F. Hardie & Co. The inhibition against one partner's binding the firm as surety is not an inhibition against making any contract out of which may arise some of the consequences, remedies, or liabilities usually relating to a contract of suretyship. A partner may assign, or indorse, in the firm name, a negotiable note owned by and payable to the firm. If the maker should not pay it, the firm would be liable to the indorsee; and in that way the firm would become, in a sense, the surety of the makers. It would be secondarily liable on the paper; the makers failing to pay it. Stearns on Suretyship, § 121, p. 191.

In Gano v. Samuel, 14 Ohio, 593, it was held that one partner, for the benefit of his firm, in order to raise money for the firm, could use the partnership name in accepting a bill of exchange to be exchanged for the acceptance of another firm; it being in substance but the giving the name of the partnership to secure an indorser. And in Morris v. Maddox (Ga.) 25 S. E. 487, it was held that a member of a mercantile partnership, to raise money for the firm, has the power to exchange the promissory note of the partnership for the promissory note of another of like amount, the proceeds of which are intended for use in the partnership business. In both of these cases, the partnership assumed liabilities, to say the least, that were analogous to that of suretyship.

The conclusion we have reached in this case is, of course, not dependent upon the correctness of the judgments of the learned courts in the last two cases we have cited.

The second objection to the notes which we have just considered—that they show on their face that A. F. Hardie & Co. is surety for two-thirds of their amount—is not, like the first objection to them, based on the order of the signatures. If the second objection is sound, it is available when the partnership name is signed to the note first in order, for, if it be true that a firm, as one of the three makers of a joint note, is surety for the other two makers for two-thirds of the note, that condition would accompany the contract whether the partnership signed first or last. The singular result would follow that while the partnership note, signed with its name only, would be regular, exciting no suspicion and showing no infirmity, the same note, with other solvent names signed to it under the partnership signature, would become irregular and show on its face an infirmity giving notice to purchasers.

We are of opinion that the appellants are entitled to the protection afforded by the law to bona fide purchasers.

It is to be regretted that, in a case like this, a partner who has been guilty of no wrong may be subjected to loss by the wrongdoing of his copartners. But, when the question arises as to which of two innocent parties shall suffer, the loss should be made to fall upon the

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one who has put it in the power of the guilty persons to perpetrate the fraud.

The court is of opinion that, on the record before us, the 12 notes are provable claims against the estate of the bankrupts.

The decree of the court of bankruptcy is therefore reversed, and the cause remanded.

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(149 Fed. 720.)

## UNION NAT. BANK OF KANSAS CITY, MO., v. NEILL.

(Circuit Court of Appeals, Fifth Circuit. December 11, 1906.)

No. 1,547.

BANKRUPTCY—REVIEW—FORM OF PROCEEDING.

Bankruptcy Act July 1, 1898, c. 541, § 25, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], provides that appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals in specified cases, including a judgment allowing or rejecting a debt or claim of $500 or more. *Held* that, where a decree rejected a claim for $30,000 which petitioner offered to prove against the bankrupt's estate, petitioner's remedy was by appeal, and, having obtained relief by appeal, his petition to superintend and revise should be dismissed.

[Ed. Note.—Appeal and review in bankruptcy cases, see In re Eggert, 43 C. C. A. 9.]

Petition for Revision of Proceedings of the District Court of the United States for the Western District of Texas.

M. L. Crawford (W. I. Ford and W. L. Crawford, Jr., on the brief), for petitioner.

C. A. Keller, for respondent.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This is a petition to this court invoking its jurisdiction to superintend and revise as matter of law a decree of the bankruptcy court. The decree in question is one rejecting a claim for $30,000 which petitioner offered to prove against the estate of A. F. Hardie & Co., bankrupts. The controversy was also brought to this court by appeal, and the opinion in the appealed case, which has just been handed down, shows a full statement of the proceedings in the court below. 149 Fed. 711, 79 C. C. A. 417.

Section 25 of the bankruptcy act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]), provides that appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals in certain specified cases; the third being "from a judgment allowing or rejecting a debt or claim of $500 or over." In this case the petitioner's proper remedy was by appeal, and on appeal the decree below has been reversed.

The petition is therefore denied, and the petitioner will be taxed with the costs.

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(149 Fed. 721).

## THOMPSON-STARRETT CO. v. FITZGERALD.

(Circuit Court of Appeals, Seventh Circuit. October 29, 1906.)

No. 1,309.

1. MASTER AND SERVANT—ACTION FOR INJURY OF SERVANT—QUESTIONS FOR JURY.

In the construction of a steel building, the contractor laid a platform of loose planks across the floor beams of the lower floor near an elevator, onto which laborers were required to wheel materials brought in to be sent up on the elevator. A plank on one side extended for several inches over a drop of four inches in the floor beams, and when plaintiff, who was one of such laborers, stepped on it the plank tipped and threw him and his barrow into the cellar causing his injury. *Held*, that the question of the contractor's negligence and failure in its duty to provide its employés with a reasonably safe place to work, and of plaintiff's contributory negligence were properly submitted to the jury, in an action to recover for the injury, the projection of the plank without support not being obvious to one on the platform.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1010-1050, 1089-1132.]

2. SAME—PLACE OF WORK—LIABILITY OF MASTER FOR IMPROPER CONSTRUCTION OF STAGING—NEGLIGENCE OF FELLOW SERVANTS.

If the building of stagings and scaffolds is not within the duty of a servant who may have to use them in doing his work, and if he has no hand in erecting them, he is not a party to the negligence of those servants to whom the master assigns the duty of providing such appliances, and he may recover from the master for an injury resulting from their negligent construction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 479.]

3. APPEAL—PRESENTATION OF OBJECTIONS IN TRIAL COURT—PLEADING—VARIANCE.

A defendant who contests a case on the merits without objection to the evidence offered on the ground of a variance, which might have been cured by an amendment of the pleadings, cannot assign such variance as a ground for reversal in an Appellate Court.

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

Amos C. Miller, for plaintiff in error.

B. J. Wellman, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge. The plaintiff in error, defendant below, was engaged as contractor in constructing a steel frame building. On the first floor a temporary platform had been made by laying boards across the beams. From this platform a hoist took bricks and other materials to the upper floors. Common laborers wheeled bricks along a runway from without the building to the platform, left there the loaded barrows to be hoisted, and went out wheeling the empty barrows that had been let down. Plaintiff, one of these common laborers, went to the side of the platform to get an empty barrow whose wheel was over the edge, and fell into the basement, receiving the injuries complained of.

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Under the assignment that the court erred in allowing the case to go to the jury, defendant's first contention is that there was not sufficient evidence of negligence in the construction and maintenance of the platform. From a careful reading of the entire bill of exceptions, it seems to us that the jury were warranted in finding that the platform was made and continuously maintained of two layers of plank supported by beams 10 feet apart; that the planks of the lower layer were 12 to 14 feet long; that some planks of the upper layer were as short as 8 feet; that at the edge where plaintiff fell there was a drop of 4 inches in the top surface of the supporting beams, which was occasioned by the construction of an ash pit; that the lower plank extended part of its width beyond the edge of the 4-inch drop; and that the upper plank was laid so that one of its ends did not reach one of the supporting beams. There was evidence that it was customary to build such platforms without fastening down the planks in any way, but not that it was customary to rest the outer planks upon insufficient supports. This structure might fairly be inferred not only from the testimony of witnesses who described the platform, but also from plaintiff's account of the manner of his fall. He says that the plank at the edge tipped sidewise, and that he and the barrow and the plank went down. Defendant's foreman testified that "the top of the iron work was all level," but on going into particulars he showed that the ash pit was 14 feet long north and south; that the beams, extending over it north and south 10 feet apart, were dropped 4 inches below the general level of the floor; and that "flanges" on top of the north 7 feet of these beams came up to the floor level. So this platform, built out over the ash pit, at its south edge would encounter a 4-inch drop, unless these 14-foot steel beams were constructed so that the south 7 feet thereof would have been 4 inches above the floor level if they had not been dropped, as the witness says they were. No such unusual form of beams was testified to.

On the basis that defendant, as master, had undertaken to provide its servant a safe appliance in the performance of his work, a finding of negligence was justified by the foregoing view of the evidence.

As the extending of the outer planks beyond the edge of the small jog in the beams was not necessarily apparent to a laborer who went on the platform in the performance of his work, there was no error in submitting the question of contributory negligence to the jury. And as there was no evidence that plaintiff had notice or knowledge of the defect, the risk was not assumed.

It is further contended under the same assignment that the alleged negligence was not that of defendant, but of fellow servants of plaintiff. If the building of stagings and scaffolds is not within the duty of a servant who may have to use them in doing his work, and if he has no hand in erecting them, he is not a party to the negligence of those servants to whom the master assigns the duty of providing such appliances, and he may recover from the master; but if it is the duty of a body of servants to construct a staging as an incident of the work upon which they are employed in common, the master performs his full duty by providing suitable and sufficient materials and men, and he cannot be held by one of the body for the negligence of any of the

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others. Phœnix Bridge Company v. Castleberry, 131 Fed. 175, 65 C. C. A. 481; National Refining Company v. Willis (C. C. A.) 143 Fed. 107.[1] There was evidence that the staging or platform in question was built by a scaffold gang under, and according to the direction of a scaffold foreman, who hired men for that purpose; that this foreman was also the foreman of the common laborers of whom plaintiff was one; and that he "took any of the laborers who happened to be around to build the scaffolds." But plaintiff did not take part in building this platform, nor was it shown that he had ever performed or been called on to perform such work. Indeed, he testified that he did not know that his foreman was also the foreman of the scaffold gang. From this evidence it might be inferred that scaffold building was a separate branch of work, not within the scope of plaintiff's employment. And conceding that a contrary inference might also be drawn, the question was one for the jury.

Complaint is made that the case proven varies from that declared. But inasmuch as defendant was willing to contest the merits of the proven case without objection, and without calling attention to the variance, which could have been cured by amendment on proper terms as to costs and continuance, there is no just grievance.

The court refused defendant's request to charge the jury that, if the accident happened through the negligence of the foreman or workmen in directing or constructing the scaffold, the plaintiff could not recover. The giving of the instruction would erroneously have withdrawn the case from the jury.

The judgment is affirmed.

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(149 Fed. 723.)

## THE VOLUNTEER.

(Circuit Court of Appeals, Second Circuit. November 7, 1906.)

No. 36.

1. TOWAGE—LOSS OF TOW BY COLLISION WITH WRECK—LIABILITY OF TUG.

A finding affirmed that a tug was in fault for the loss of her tow by running her upon a sunken wreck at night, upon evidence showing without contradiction that a lantern showing a red light, and capable of burning for 24 hours after each filling, was filled, lighted, and set above the wreck on the evening before, and that it was burning brightly two hours before the collision, and that the tug maintained no sufficient lookout.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Towage, §§ 11, 17–19, 36.]

2. ADMIRALTY—PLEADING—ESTOPPEL.

In a suit in admiralty to recover for the loss of a tow by collision with a sunken wreck at night, in which the tug and the owner of the wreck are both made defendants, and charged with fault, the libelant is not precluded from recovering against the tug alone because the libel charges the owner of the wreck with a fault which, if proved, would exonerate the tug, which charge is admitted by the answer of the tug, but is not sustained by the evidence; the practice in admiralty being to bring all parties before the court, and to determine the controversy on the merits as it appears from the proof, regardless of technicalities of pleading.

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[1] 74 C. C. A. 301.

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Appeal from the District Court of the United States for the Southern District of New York.

**Libel filed by the owner of a cargo of coal on board the barge McNally and by the master of the barge, to recover, respectively, for the loss of the cargo and for the personal effects of said master. The libel alleged that the tug Volunteer was negligent in towing the McNally upon the wreck of the barge Doherty, which lay sunk in the channel at South Norwalk, Conn. It also alleged that the owners of the Doherty were at fault in not maintaining a light above said wreck. The collision occurred about 20 minutes after 12 on the night of October 13, 1903.**

**The district judge condemned the tug and her claimant appeals to this court.**

Lawrence Kneeland, for libelants.

De Lagnel Berier, for The Volunteer.

La Roy S. Gove, for The Doherty.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. If there were a light above the wreck at the time of the collision the tug was at fault; if not, the owners of the Doherty were at fault for failing to keep a light there. The question thus presented was one of fact and was decided by the district judge after hearing and seeing the witnesses. We have repeatedly held that such a finding will not be disturbed unless clearly against the weight of evidence.

That a lantern showing a red light had been set above the wreck, capable of burning for 24 hours after each filling, is proved by uncontradicted testimony. It was refilled on the day in question between 4 and 5 o'clock in the afternoon and was seen burning brightly at 10 o'clock. There is a presumption that in such circumstances the light continued to burn. If there had been a vigilant lookout on the Volunteer who had testified that he saw no light, such testimony, especially if corroborated by the wheelsman and other members of the crew in the actual discharge of their duties, might be sufficient to overcome the presumption. There was, however, no such evidence, Those on the tug and tow whose testimony was given were attending to other matters and giving little heed to the situation ahead. The master of the tug died before the trial. The only two witnesses who testify on the subject are the master of the McNally and the deck hand of the Volunteer. They were walking about and talking, and it is not pretended that either was giving his undivided attention to the business of looking out. Their evidence was unsatisfactory and the district judge gave little credence to their statements.

The case, in this respect, is wholly different from The John H. Starin, 122 Fed. 236, 58 C. C. A. 600, where the captain and quartermaster of a large passenger steamer, both licensed pilots and mariners of many years experience, were in the pilot house and a competent lookout was at the bow. These witnesses united in saying that they saw no light ahead, although each was at his post attending vigilantly to his duty. This testimony was held to outweigh the testimony offered on behalf of the injured schooner that a light was set in the rigging and was seen burning half an hour before the accident, there being no satisfactory proof that the lantern was properly filled and trimmed.

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The case at bar is similar on the facts to The Fin MacCool, 147 Fed. 123,[1] where it was held by this court that the testimony of a listless and inattentive crew that they saw no light on a sunken wreck was insufficient to overcome the positive testimony that a light was there.

The libelants proceeded against the tug and the owners of the Doherty, the libel alleging that the latter were negligent in failing to maintain a light. In its answer the tug admitted this allegation and now asserts that by reason of this admission the libelants are precluded from recovering upon the theory that the light was burning.

If this were a common law action between the libelants and the owner of the tug there would be great force in the contention, but it has little application to a suit in the admiralty where the aim and purpose of the court is to bring all parties before it and determine the controversy on the merits as it appears from the proof. The libelants might have proceeded against the tug alone, in which event her owner would unquestionably have brought in the owners of the Doherty. The Hudson (D. C.) 15 Fed. 162; Admiralty Rule 59, Supreme Court. The libelants were entitled to recover from the tug or the owners of the Doherty. The question of light or no light was one of vital importance to these two parties, but of little interest to the libelants. The tug by admitting the allegation of the libel as to the fault of the owners of the Doherty could not preclude them from proving that they were free from fault. This they succeeded in doing to the satisfaction of the district judge and having ascertained where the truth lay it was his duty to decree accordingly. It would be a travesty of justice to turn a meritorious libelant out of court because one of the respondents admits that the other was at fault.

The decree is affirmed with interest and costs.

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(149 Fed. 725.)

## THE WINNIE.

(Circuit Court of Appeals, Second Circuit. December 4, 1906.)

No. 56.

TOWAGE—INJURY OF TOW—LIABILITY OF TUG.

A tug is not liable merely because a tow was injured while in its custody, but in an action against it to recover for the injury, the burden rests upon the libelant to affirmatively prove negligence or fault, which cannot be presumed merely because the injury is not otherwise accounted for.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Towage, § 34.]

Appeal from the District Court of the United States for the Southern District of New York.

On appeal in admiralty from a decree of the District Court of the United States for the Southern District of New York awarding $612.98 damages and costs against the steam tug Winnie for negligent towage of libelant's canal boat Fermoil. The opinion of the District Court is reported in 137 Fed. 166.

H. G. Ward, for appellant.

La Roy S. Gove, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

[1] 77 C. C. A. 349.

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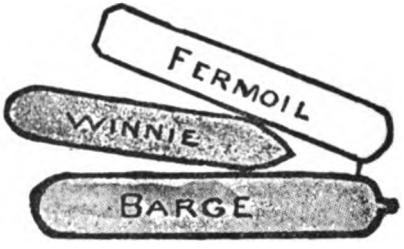
COXE, Circuit Judge. The important facts are stated in the opinion of the district judge.

The tug Winnie was engaged to tow the libelant's canal boat Fermoil and a larger boat, the barge Gildersleeve, from the Atlantic Basin to a stake-boat off Liberty Island in New York harbor. The Fermoil was made fast to the port side of the tug and the Gildersleeve to the starboard side, the bows of both vessels extending about 45 feet beyond the bow of the tug. The tide was ebb and a choppy sea was running. When the canal boat reached her destination it was found that two planks on her starboard side were broken. The main fault imputed to the tug is that the tow was improperly made up, the bows of the two boats being drawn together so that they were not more than five or six feet apart, as illustrated by the following diagram:




This theory is supported by one witness only, the master of the Fermoil.

The claimant insists, on the contrary, that the tow was made up in the usual way, with the boats securely lashed to the tug and parallel to each other, their bows being 18 or 20 feet apart. The claimant's contention is sustained by the master, pilot, fireman and deck hand of the tug and by the exceedingly persuasive presumption that no tugman, with even a superficial knowledge of the requirements of the service, would make up his tow in a manner so unprecedented that no plausible motive or reason can be assigned therefor. Not only would such an arrangement augment the hazard but it would render the service more difficult, requiring increased power to propel such a clumsy flotilla through the water.

The district judge was clearly of the opinion that the weight of testimony was with the claimant on this issue, but he found for the libelant upon the theory that the damage could be accounted for in no other way.

He says:

"The preponderance of the testimony, as well as the probabilities in view of the additional strain put upon the tug, are with the claimant, but unless something of the kind contended for by the libelant was done, I see no way of accounting for the damage."

We are unable to give our assent to this reasoning. The burden was on the libelant to prove fault on the part of the tug; in this he failed. The testimony preponderates overwhelmingly in favor of the claimant to the effect that the tow was made up in the usual way. This being so we cannot escape the conclusion that liability cannot

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be predicated of a finding that the tow was made up in an unusual way. The libelant alleged negligence and failed to prove it. It was then the duty of the court to dismiss the libel.

It is not at all unlikely that the damage was caused by the swells of passing ferry boats, but the court is not called upon to enter the realms of conjecture in an attempt to ascertain how the accident was caused. It is enough for the present case that the tug did not cause it. There was nothing in the condition of the wind or water to make towing unusually hazardous. The master, according to the great preponderance of proof, exercised the reasonable care, caution and maritime skill required. The tug was not an insurer, and cannot be held liable merely because the Fermoil received an injury while in her custody.

The case is easily distinguishable from the Gennessee, 138 Fed. 549, 70 C. C. A. 673, where the make up of the tow was such as to invite disaster while the flotilla was lying to during a storm and the tug made no effort to mitigate the risks due to an unusually perilous situation.

The decree is reversed with costs, and the cause is remanded to the District Court with instructions to dismiss the libel.

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(149 Fed. 727.)

## BEE et al. v. BARNES.

(Circuit Court of Appeals, Fourth Circuit. November 19, 1906.)

No. 630.

TAXATION—SALE OF LAND—SEPARATE INTERESTS—TAX TITLE—VALIDITY.

Where each of two tracts of land was assessed for taxation at its true value as the property of the owner of the fee, and she paid the full amount of the taxes due thereon, notwithstanding an outstanding one-sixteenth interest in any oil that might be produced from the land, a sale of such interest for nonpayment of taxes assessed thereon was void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1267.]

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg.

For opinion below, see 138 Fed. 476.

This was a suit instituted in the Northern district of West Virginia, the object of which is to cancel a tax deed executed on the 19th of January, 1903, by W. R. Merservie, clerk of the county court of Ritchie county of that state, to B. W. Bee for one-sixteenth interest in gas and oil and mineral on a tract of land of 69½ acres and also another tract of land of 2½ acres, making 72 acres in all. The court below has stated the facts upon which this controversy is based in a clear and succinct manner as follows:

"John K. Kelley and Clara V. Kelley, on March 29, 1898, by deed which was admitted to record April 2, 1898, conveyed to plaintiff, Barnes, a citizen of Ohio, 'one-sixteenth part of all oil and gas and other mineral substances in and under' two parcels of 69½ and 2½ acres of land, situate in Ritchie county, this state, fully described in the deed by metes and bounds, for the consideration expressed of $2,000 cash. By deed of September 21, 1898, recorded September 24, 1898, Barnes conveyed a half of this, or one thirty-second interest in all, to Mallory Bros.; but they subsequently, by deed dated March 29, 1903, reconveyed back this interest to Barnes. The surface and remaining fifteen-sixteenths undivided interest of the 'oil, gas, and other mineral substances' remained vested in Mrs. Kelley. On the land books of Ritchie



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county, Mrs. Kelley, for the year 1898, was assessed with these two tracts separately, as 69½ acres and 2½ acres, in fee, as situate on 'wts. of Bonds Creek,' N. E. 9 miles from court house, valued each at $6.50 per acre, and a total valuation of $425, for the 69½ acres, instead of $451.75, the true total at that rate, and for the 2½ acre tract of $15, instead of $16.25, the true valuation at that rate. She was assessed for state purposes on the 69½ acres at the rate of 25 cents on the $100, the sum of $1.13, the full amount due on the true valuation, 6¾ cents more than due on the valuation given; 45 cents for state school purposes, at a rate of 10 cents, the correct amount on the true valuation, 2½ cents too much on the valuation given; $1.81 for county purposes, at a rate of 40 cents, the correct amount on the true valuation, 11 cents too much on the valuation given; $2.26 for road purposes and teachers' fund, respectively, each at the rate of 50 cents, the right amount on the true valuation, 12½ cents too much on each for the valuation given; and $1.36 for building fund, at a rate of 30 cents, the correct amount on the true valuation, 8½ cents too much on the valuation given. The 2½-acre tract also shows that, while the valuation was fixed at $15, instead of $16.25, the taxes were assessed upon the true valuation, and not the valuation given. These tracts had been acquired by Mrs. Kelley by different deeds from different parties. In pencil on the assessment book just after Mrs. Kelley's name is written, '1-16 oil reserve to G. W. Barnes'; but the plaintiff, although his deed bore date two days before April 1st, the assessment date fixed by law, was not assessed in any manner for that year on account of his one-sixteenth undivided interest in the 'oil, gas, and other mineral substances in and under' said two parcels of land.

"For the year 1899 Mrs. Kelley is assessed with these same two tracts separately, as having title in fee, and the same location, bearing, and distance from the courthouse is given, as also the same valuation of $6.50 per acre each, and the same erroneous total valuations of $425 and $15, respectively. This year, however, she was not assessed at the given rates upon the true total valuation, as was the case in the preceding year, but upon the false total valuations given for both years. In this last year following her name, in parenthesis, are the words, 'less one-sixteenth oil, &c.' For this year 1899, when by the records Mrs. Kelley was shown to be vested with fee-simple title in the surface of and in fifteen-sixteenths undivided interest in the 'oil, gas, and other mineral substances in and under' these two tracts, an one thirty-second of the latter, undivided, was in plaintiff, Barnes, and the remaining one thirty-second thereof was in Mallory Bros., the said Mallory Bros. were assessed with nothing, so far as shown, because of their interest; but plaintiff, Barnes, was assessed with 'one-sixteenth oil &c., reserve' in 72 acres, claimed now to be the 69½ and 2½ acre tracts consolidated, at the rate of 50 cents per acre, or a total valuation of $36, upon which taxes amounting to 78 cents in all, according to the fixed rates, were charged. These taxes were not paid by Barnes, by reason of which this interest was returned delinquent and sold by the sheriff, January 13, 1902, and purchased by defendant Bee, who paid a total for taxes and expenses of $2.35, and on the 16th day of January, 1903, had a surveyor's report made, and on January 19, 1903, received from the clerk of the county court a deed therefor, which surveyor's report and deed was on said last day admitted to record. It is to be noted that neither the report nor deed bound the 72 acres as a single tract, but simply copy the metes and bounds of the 69½ and 2½ acres, respectively, apparently from the deed of Kelley and wife to Barnes, to which both refer.

"Meanwhile, on the 20th day of October, 1902, Kelley and wife and Barnes made a lease, in which Mallory Bros. did not join, to Upham & Rolston, whereby they granted the lessees all the oil and gas in and under these lands, described as 70 acres, and described generally by reference to the abutting owners, for the period of two years, upon usual terms, for the payment of one-eighth royalties and other conditions not necessary to set forth. This lease was assigned by the lessees to Sarber Bros. & Co., and on January 14, 1903, the lease and assignment were together admitted to record. A valuable 200-barrel oil well resulted, and this one-sixteenth undivided interest became of value estimated at from $5,000 to $6,000. Defendant Bee insisted upon his being the owner of the interest under his tax deed, refusing to

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surrender his claim; hence this suit, brought to set aside said tax deed as a cloud upon his title, and the appointment of a receiver herein, to whom has been paid over the proceeds arising from the sale of oil due to this interest."

Thos. P. Jacobs and Geo. W. Johnson, for appellants.

Mason G. Ambler (B. M. Ambler and C. D. Merrick, on briefs), for appellee.

Before PRITCHARD, Circuit Judge, and PURNELL and KELLER, District Judges.

PRITCHARD, Circuit Judge (after stating the facts). It appears from the record that the two tracts of land of 69½ and 2½ acres were assessed in 1898 as the property of Mrs. Kelley at $535 and $15, respectively, and these same tracts were assessed to her in 1899 at the same valuation, and she paid all of the taxes in full for the year 1899. The tax deed in question is based on an assessment for the year 1899 against Barnes; the defendant claiming title under this deed, which was executed to him by the clerk of the county court by virtue of a tax sale on account of the nonpayment by Barnes of the taxes due for the year 1899 on his undivided interest, of one-sixteenth of oil, etc., in the two tracts of land in question.

We have read and carefully considered the opinion of the court below, and fully concur in the conclusions reached therein. Inasmuch as each of the tracts of land was assessed as its true valuation for taxable purposes for the years of 1898 and 1899, as the property of Mrs. Kelley, and the full amount of the taxes due thereon by virtue of such assessment being paid by her, we are of opinion that the sale of the premises described for the nonpayment of taxes by Barnes was unauthorized, and that the deed made in pursuance of such sale is void.

For the reasons stated, the decree of the Circuit Court is therefore affirmed

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(149 Fed. 729.)

## THE MARS.

(Circuit Court of Appeals, Third Circuit. January 16, 1907.)

1. SEAMEN—PERSONAL INJURIES—LIABILITY OF VESSEL.

Where libelant, a fireman on a tug, was scalded while attempting to tighten the packing on the valve of an ash hoist, resulting from his turning a screw the wrong way and the machinery was not materially defective, the tug was not liable for his injuries.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seamen, §§ 185, 186; vol. 34, Master and Servant, § 758.]

2. SAME—MEDICAL ATTENDANCE.

Where a fireman on a tug was injured in the course of his employment, the fact that the tug was engaged in comparatively short coast-wise trips did not relieve her from the usual obligation of a vessel to her crew to furnish care and maintenance to effect a cure.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seamen, §§ 30, 187.]

3. SAME.

The obligation of a vessel to furnish medical attendance, etc., to a seaman injured in her service does not end with the termination of the voyage, where there was not sufficient time or facilities for the vessel to have then performed its duty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seamen, §§ 43, 187.]

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4. SAME—FORFEITURE OF RIGHT.

A seaman injured in the course of his employment by his own negligence does not thereby forfeit his right to cure and maintenance at the expense of the vessel, where the injury was not caused by his gross negligence or willful neglect of orders, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seamen, § 187.]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

For opinions below, see 138 Fed. 941; 145 Fed. 446.

John F. Lewis, for appellant.

Howard M. Long, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. On March 29, 1904, the tug Mars, being at Philadelphia and contemplating a towing trip to New England ports and return, shipped Manides, the libelant, as a fireman. He went to work on the 30th. About midnight of that day, while the tug and her tow were lying at Reedy Island in the Delaware awaiting the tide, Manides, in trying to turn a nut to tighten the packing on the valve of an ash hoist, was badly scalded. He was placed in a hospital at Philadelphia, where he remained a considerable time, and was discharged before a cure was effected. He filed a libel against the Mars for damages for his personal injuries. The court held he was not entitled to recover, saying:

"There is considerable evidence offered for the purpose of showing that the machinery was generally out of order, but I am not convinced that this was the case. It was the ordinary experience with machinery that requires constant attention in order that it may be kept up to the standard. It was not defective or out of repair to an extent that the tug should be liable for any injuries resulting therefrom, and for this reason we do not think the respondent is liable to the libelant in damages for the injury. There was no failure of ordinary care on the part of the owners of the tug to furnish a safe place for the libelant to do his work, and the machinery about which he was working and the implements used in the performance of his work were safe and in good condition, save and except the ordinary current repairs necessary to keep them in such condition. The injury to the libelant was the result of an accident while performing certain work with which he was acquainted, and which should have been performed in a careful manner to avoid the very injury he received. He is therefore not entitled to recover damages against the respondent."

Under a prayer for general relief, however, the court decreed the tug should pay him $291 for expenses for maintenance and cure; $50 being for future medical attendance. From the decree for payment thereof the tug took this appeal.

The evidence bearing on this branch of the case is not printed. In its absence, and in view of the fact that the court only allowed $291 of $1,593.68 claimed, the presumption is that the moderate amount decreed was justified by the proofs, and that the sum of $50 allowed for future treatment was to finish a course of treatment interrupted by his discharge from the hospital. The only question, therefore, for us to consider is whether Manides was entitled under his employment and the finding of the court noted above to any allowance whatever for cure and maintenance. The fact that the tug was engaged in

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comparatively short coast-wise trips does not relieve her from the usual obligation of a vessel to her crew. One of these is to furnish at the vessel's expense, care and maintenance to a seaman injured in her service. The Osceola, 189 U. S. 175, 23 Sup. Ct. 483, 47 L. Ed. 760. This right extends to a fireman. The North America, 5 Ben. 486, Fed. Cas. No. 10,314. The word "cure" is used in its original meaning of care, and means proper care of the injured seaman and not a positive cure which may be impossible. The Atlantic, Abb. Adm. 451, Fed. Cas. No. 620. The duty is to furnish means of cure and to use all reasonable efforts for that purpose. Brown v. Overton, Fed. Cas. No. 2,024. In the nature of things the end of the voyage does not end the obligation, if there was not sufficient time and facilities for the vessel to have then done its duty. Its unfulfilled obligation may continue after the voyage ends. McCannon v. Dominion Atlantic Company (D. C.) 134 Fed. 762; Henry B. Fiske (D. C.) 141 Fed. 191; The Svealand, 136 Fed. 109, 69 C. C. A. 97; Reed v. Canfield, 1 Sumn. 195, Fed. Cas. No. 11,641. It is claimed, however, that libelant lost his right to cure because the injury resulted from his own negligence. The testimony, however, discloses no gross negligence, willful neglect of orders, or indeed any such facts as are in some cases (The Ben Flint, 1 Abb. (U. S.) 126, Fed. Cas. No. 1,299, and cases cited) recognized as affecting a seamen's right. The most that can be said is that the libelant in trying to tighten the screw mistakenly turned it the wrong way, thus loosening it and permitted the steam which scalded him to escape. Neither the ancient codes or the modern decisions show any reasoning or authority for holding that, where the injury to the seaman in the performance of his accustomed duties was received through remissness or not unusual carelessness on his part, he thereby forfeits his right to cure and maintenance. The Osceola, supra; The City of Alexandria (D. C.) 17 Fed. 395; The Ben Flint, supra.

The decree of the District Court is therefore affirmed.

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(149 Fed. 731.)

## PORT v. SCHLOSS BROS. & CO.

(Circuit Court of Appeals, Third Circuit. January 16, 1907.)

No. 53.

WRIT OF ERROR—PARTIES—JOINT JUDGMENT.

Where two members of a firm were jointly sued on a firm debt and judgment was entered against both, a writ of error could not be maintained by one of them alone in the absence of summons, severance, or a sufficient showing for nonjoinder of the other.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1802, 1806, 1811.]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Leslie A. Howard and F. P. Tams, for plaintiff in error.

Joseph Stadfeld, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

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BUFFINGTON, Circuit Judge. This is a writ of error to the Circuit Court of the United States for the Western District of Pennsylvania. In that court Schloss and others, citizens of Maryland, brought an action of assumpsit against Clarence A. Port and W. J. Snyder, citizens of Pennsylvania, partners trading as Port & Snyder, for a merchandise account in excess of $2,000. Both defendants were served. Port appeared and defended the suit. Snyder entered no appearance, but was called as a witness. The jury was sworn against both defendants without objection by Port, and after a trial on the merits a verdict was rendered in favor of the plaintiffs for the full amount of their claim. After entry of judgment against both defendants Port alone sued out this writ of error, then for the first time raising the question that a judgment for default should have been entered against Snyder; that the jury was improperly sworn against both defendants; that the judgment against Snyder was invalid, and therefore there was error in entering judgment against him, Port.

Before passing on these questions, we are met by a motion of the defendants in error to dismiss this writ. In support thereof it is contended that, there being a joint judgment against both Port and Snyder, a writ of error will not lie unless both join in it. There has been no summons, severance, or sufficient ground for nonjoinder shown. The motion to dismiss is supported by authority. In Feibelman v. Packard, 108 U. S. 14, 1 Sup. Ct. 138, 27 L. Ed. 634, it was said:

"Moses Feibelman and George Woelker, as partner, sued the defendants in error to recover damages for the seizure of their partnership goods by Packard, marshal of the United States for the district of Louisiana. A judgment was rendered against them. Their interests in the suit was joint, and the judgment affects them jointly and not separately. Feibelman alone has brought this writ of error, and there has been no summons and severance or other equivalent proceeding. It follows that the writ must be dismissed on the authority of Williams v. Bank of the United States, 11 Wheat. 414, 6 L. Ed. 508; Masterson v. Herndon, 10 Wall. 416, 19 L. Ed. 953; Simpson v. Greeley, 20 Wall. 152, 22 L. Ed. 338."

To the same effect, in addition to the case cited, are Estis v. Trabue, 128 U. S. 228, 9 Sup. Ct. 58, 32 L. Ed. 437, and Mason v. United States, 136 U. S. 582, 10 Sup. Ct. 1062, 34 L. Ed. 345.

In view of these decisions, the motion to dismiss must prevail.

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(149 Fed. 732.)

## PITTSBURGH RY. CO. v. CLUFF.

(Circuit Court of Appeals, Third Circuit. January 17, 1907.)

No. 37.

STREET RAILROADS—INJURY TO PERSON ON TRACKS—CONTRIBUTORY NEGLIGENCE.

A plaintiff who, after seeing a street car approaching while he was still upon the sidewalk, started to cross a curved track which led into a cross street without again looking, and was struck by the car and injured, was chargeable with contributory negligence as matter of law, and cannot recover for the injury; nor is he relieved from such negligence by the fact that there was another track, which went straight ahead past the corner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 207, 208]

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In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

James C. Gray, for plaintiff in error.
Thomas M. Marshal, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and LANNING, District Judge.

DALLAS, Circuit Judge. The defendant in error brought an action against the plaintiff in error to recover damages for personal injuries to the plaintiff below, caused by his having been struck, while crossing one of the streets of the city of Pittsburgh, by an electric railway car operated by the defendant below. At the close of the trial the court was requested to charge, that "under all the evidence the verdict must be for the defendant"; and the refusal of this request, amongst other things, is here assigned for error.

It may be assumed that the defendant's servants were not as careful as they should have been, for we rest our decision solely upon the ground that it was conclusively shown that the proximate and decisive cause of the accident was lack of ordinary prudence upon the part of the plaintiff himself. There was no conflict of evidence. The defendant offered none. By the plaintiff's own testimony it plainly appeared that while he was still upon the sidewalk he saw the car coming. He did not wait, however, nor look again, but stepped directly in front of it. It was moving rapidly—perhaps too rapidly; but he realized this, and therefore should have been especially careful. He did not know that it would leave the straight track and follow the curve by which it reached the point at which he was struck; but the curved track was as plainly within his view as the straight one, and there was nothing to justify him in proceeding upon the assumption that the car would not make the turn. In short, there was no support whatever for any inference other than that the accident was directly due to the plaintiff's own heedlessness, and consequently the binding instruction for which the defendant asked ought to have been given.

The judgment is reversed.

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(149 Fed. 733.)

## AMERICAN TIN PLATE CO. v. SMITH.

(Circuit Court of Appeals, Third Circuit. January 4, 1907.)

No. 34.

MASTER AND SERVANT—ACTION FOR INJURY TO SERVANT—ASSUMPTION OF RISK.

A judgment on a verdict for plaintiff in an action by a servant against the master to recover damages for a personal injury in which the defense was the assumption of risk by plaintiff affirmed.

For former opinion, see 143 Fed. 281, 74 C. C. A. 419.

Before DALLAS and GRAY, Circuit Judges, and LANNING, District Judge.

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PER CURIAM. We think that the opinion rendered and decision made when this case was before this court at a former term (American Tin Plate Co. v. Smith, 143 Fed. 281, 74 C. C. A. 419) requires that the judgment brought up by the present writ of error should be affirmed, and therefore it is so ordered.

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(149 Fed. 734.)

## MOLINE TRUST & SAVINGS BANK v. WYLIE.

(Circuit Court of Appeals, Eighth Circuit. December 22, 1906.)

No. 2,457.

APPEAL AND ERROR—DISMISSAL OF APPEAL—VIOLATION OF RULES OF COURT.

A Circuit Court of Appeals may dismiss an appeal where the appellant fails to comply with rules 11 and 24 of the court (90 Fed. cxlvi, clxiv, 31 C. C. A. cxlvi, clxiv) respecting assignments of error and briefs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3101.]

Appeal from the District Court of the United States for the Southern District of Iowa.

On motion to dismiss appeal.

Geo. W. Wood and J. A. Hanley, for appellant.

Walter H. Petersen and Walter M. Balluff (Wm. M. Chamberlain, E. E. Cook, and F. L. Dodge, on the brief), for appellee.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

PER CURIAM. The appeal in this case is dismissed on the motion of the appellee upon the authority of City of Lincoln v. Sun Vapor Street Light Co., 8 C. C. A. 253, 254, 59 Fed. 756, 758, Oswego Township v. Travelers' Ins. Co., 17 C. C. A. 77, 70 Fed. 225, Sovereign Camp of Woodmen of the World v. Jackson, 38 C. C. A. 208, 97 Fed. 382, and Western Assurance Co. v. Polk, 44 C. C. A. 104, 104 Fed. 649, for the failure of the appellant to comply with rules 11 and 24 of this court (90 Fed. cxlvi, clxiv, 31 C. C. A. cxlvi, clxiv), which relate to the assignment of errors and the briefs required.

The motion of the appellant to amend its brief is denied.

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(149 Fed. 734.)

## BUSH CO. v. CENTRAL R. CO. OF NEW JERSEY.

## CENTRAL R. CO. OF NEW JERSEY v. BUSH CO.

(Circuit Court of Appeals, Second Circuit. November 7, 1906.)

Nos. 42, 43.

WHARVES—SINKING OF CAR FLOAT AT FLOAT BRIDGE—UNSEAWORTHY CONDITION.

Findings of the trial court affirmed that the sinking of libelant's car float at the float bridge of respondent railroad company, while it was unloading cars therefrom, was due to her unseaworthy condition caused by her having two feet of water in her hold, and that respondent was not negligent either in the manner of discharging her, or in failing to inspect her and measure the water in her hold, it appearing that it was her

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master's duty to notify it of her condition, and that no such notice was given, and her condition was not apparent without inspection.

Appeal from District Court of the United States for the Southern District of New York.

These causes come here upon appeals from final decrees on cross libels, dismissing the libel of the Bush Company in the first action, and awarding damages and costs to the libelant, the Central Railroad Company, in the second action. The opinion of the court below is printed in 130 Fed. 222.

Albert A. Wray, for Bush Company.

George Holmes, for Central Railroad of New Jersey.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The issues herein raised by questions of fact were presented by testimony in open court, and were disposed of in favor of the railroad company.

The findings and decisions are chiefly challenged on the ground that the railroad was negligent:

"(1) In failing to inspect the vessel and measure the water in her hold before she was toggled fast to the bridge.

"(2) In toggling the boat to the railroad bridge with the bow nearly two feet above its normal position in the water, and attempting to unload her while in this position."

And that the evidence was insufficient to establish that the float was unseaworthy.

The libel alleged, and the trial of libelant's case against the railroad company proceeded upon, the theory that the negligence complained of consisted in the fact that:

"While the respondent's said locomotive and drill car were employed to haul said cars from off said car float, they were so negligently, carelessly, unskillfully, and improperly handled, that the said drill car was brought violently into collision with the forward car upon said float, and the force of said blow drove said three cars to the extreme outboard end of said car float, where they remained for upward of half an hour, greatly straining said car float by the uneven and improper balancing of the weight of her load. That said automatic brakes were out of order, and were negligently suffered to remain so, and did not work, and the brakes upon said locomotive and the locomotive itself were not employed to lessen the force of the blow when the cars collided as aforesaid, and to stop said drill car before said collision took place."

This theory was disproved by the great preponderance of testimony, and the claims of negligence now advanced were introduced by amendment at the close of the hearing.

The finding of the court that the railroad was not negligent in failing to inspect the vessel and measure the water in the hold is supported by the admission of the man in charge of the car float, Independent Stores No. 3, that the yardmaster asked him if he had any water in the float, and how much he had, and by the failure of the Bush Company to introduce any evidence to show that it gave any notice or information as to the presence of water in her hold. The utmost that can be claimed in favor of the Bush Company as to evidence

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on this point is that if an outside boat comes to the float and anything is wrong, it is the duty of her captain to give notice thereof, but that if the condition of an outside boat is such as to challenge the attention of the float master, or if he is notified by her captain that anything is wrong, he would not let the boat in, and that otherwise he would. But the evidence fails to show that any such condition was apparent in this float, and, as already shown, proves that no actual notice was given. The claim of negligence in toggling the bow of the boat above her normal position was asserted solely on the strength of a statement by one witness for the railroad company. But it appeared that this statement was made under a misunderstanding of a question, and it was seasonably corrected by the witness in his subsequent testimony. The evidence abundantly supports the finding of the court below that the proximate cause of the loss was the unseaworthiness of the float.

The decree upon the libel of the Central Railroad Company is affirmed, with interest and costs. The decree dismissing the libel of the Bush Company is affirmed, with costs.

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(149 Fed. 736.)

## UNITED SHIRT & COLLAR CO. et al. v. BEATTIE et al.

(Circuit Court of Appeals, Second Circuit. October 18, 1906. On Rehearing, January 30, 1907.)

No. 219.

1. PATENTS—ANTICIPATION.

A patent for a successful machine is not void for anticipation, because a prior machine intended for a different purpose may possibly be capable of use as an inefficient substitute for the later machine.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 66–72.]

2. SAME—INVENTION.

The conversion of an abandoned machine, which was a failure, into one which is operative and successful, by the introduction of new and ingenious features, however simple, constitutes invention, which may be protected by a patent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 73.]

3. SAME—ANTICIPATION—SUFFICIENCY OF PROOF.

A patent will not be held void for anticipation by an unpatented machine on the oral testimony of witnesses, the accuracy of which depends upon their unaided recollection of events which occurred 25 years previously, unless it is exceptionally clear and convincing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 78.]

4. SAME—PERSONS ENTITLED TO PATENT AS INVENTORS.

The right of one who conceives an invention to patent the same as the sole inventor is not lost because he lacks the mechanical skill to embody his invention in a machine, and employs another to construct such machine.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 68, 118, 125.]

5. SAME—INFRINGEMENT—SUFFICIENCY OF PROOF.

A decree for infringement of a patent will not be reversed on appeal, because the proof shows that the infringing machine was sold by a concern doing business under a different name and style from that of the partnership of defendants as alleged in the bill, where it also fairly shows that

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the defendants were the proprietors of such concern, and the fact that they made the sale was not contested in the trial court.

6. SAME—INVENTION AND INFRINGEMENT—FOLDING MACHINE.

The Pine patent, No. 645,871, for a machine for folding the edges of blanks for making cuffs, collars, and like articles, was not anticipated in the prior art, and covers a true combination, although of old elements, which discloses invention; also *held* valid as against the claim that the patentee was not the inventor, and infringed as to the first four claims.

Appeal from the Circuit Court of the United States for the Northern District of New York.

On appeal from a decree of the Circuit Court for the Northern District of New York holding valid and infringed the first four claims of letters patent No. 645,871, granted March 20, 1900, to the complainant, United Shirt & Collar Company, as assignee of James K. P. Pine, the inventor, for an improvement in machines for inturning the edges of collars, cuffs and like articles. The application was filed October 3, 1894. The other complainant, Reece Folding Machine Company, is the sole licensee and is engaged in making and leasing machines under the patent. The defenses in the Circuit Court were lack of novelty and invention, prior use, patentee not sole inventor and non-infringement, particularly of claim 4. The assignment of errors present the same questions in this court.

The opinion of the Circuit Court is reported in 138 Fed. 136.

George A. Mosher, for appellants.

E. H. Brown, for appellees.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

COXE, Circuit Judge. The Pine patent relates to improvements in machines for infolding the edges of cuff blanks by which the infolds are formed in the blanks and are pressed with the fabric folded back on itself by the combined action of the support on which the blanks are placed, a templet defining the form of the blanks, and infolders actuated to carry the subtending edges of the blanks inwardly or over the defining edges of the templet. The infold thus formed is fixed in the blanks by pressure between the support and the infolders before the templet has been removed and the infolders withdrawn from the folded edges of the blanks. Two blanks are then placed together with the folded over edges concealed between them and united by a line of stitching along their folded edges, the stitching being done, of course, on another machine. The patented device may be used not only for folding cuffs but for collars and other similar articles.

Five pages of drawings containing seven figures, illustrating the machine in its minutest details, accompany the description. The claims involved contain, substantially, the same elements. The first claim which is a sufficient exemplification of the others is as follows:

"(1) In a machine for infolding cuff-blanks or analogous articles, the combination of a support for the blanks, a templet having expanding and contracting plates, edge portions of which are adapted to bear directly upon the blanks upon said support, and within edge portions of the blanks, infolders constructed to move inwardly and outwardly whereby the edge portions of the blanks may be folded over the edge portions of the templet, and means whereby the folds of the blanks may be pressed between the support and the infolders after withdrawal of the plates of the templet from the folds and thereby fixed with a sharp fold."

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The combination here claimed contains the following elements in a machine for infolding cuff blanks: (1) A support for the blanks. (2) A templet, having expanding and contracting plates with edge portions bearing directly upon the blanks within the edge portions of the blanks. (3) Infolders constructed to move inwardly and outwardly for folding the edges of the blanks over the edges of the templet. (4) Means whereby the blanks may be fixed with a sharp fold by being pressed at the infolds between the support and the infolders after the templet has been contracted and withdrawn. An analysis of the other claims is unnecessary, further than to say that the fourth claim is specifically limited to "means for forcing the bed against the infolders," whereas the other claims are broad enough to include means for forcing the infolders down upon the support. The infolders of this claim are "constructed to move inwardly and outwardly on all sides simultaneously."

The operation of the machine is as follows: A blank is placed on the bed, or support, and the templet is brought down on the blank with the expanding plates resting thereon. By means of a lever these plates are moved outwardly over the blank. The folders are then moved inwardly carrying the edges of the blanks over the outer edges of the plates. The plates are then drawn out of the folds by reversing the lever. By means of a foot treadle the support is forced up pressing the infolds between it and the infolders. The templet is then raised and the infolders are moved outwardly leaving the blank smoothly and sharply folded on the support. The patentee takes pains to explain, what the law probably implies, that the machine can be made applicable to folding square corners and blanks of other forms and that other, equivalent, means can be substituted for the pressing upward of the support without departing from the spirit of the invention.

We do not think that Pine has made a "pioneer invention," but we cannot resist the conclusion that he has made a valuable improvement, which, for the first time, placed in the hands of manufacturers of collars and cuffs a practical working device which does the work faster and better than previous devices. Though not entitled to a broad range of equivalents the complainants are entitled to protection against one who has admittedly appropriated the identical combination of three of the claims in controversy. Time will be saved if the concession be made at the outset that the elements of the claims, considered separately or in different environments, were, speaking generally, all old. The question here is was the combination old? That the claims cover a combination, and not an aggregation, we have no doubt, even though the operations of the separate elements do not synchronize. Forbush v. Cook, 2 Fish Pat. Cas. 668, Fed. Cas. No. 4,931; Heath Cycle Co. v. Hay (C. C.) 67 Fed. 246; Int. Recording Co. v. Dey, 74 C. C. A. 68, 142 Fed. 736, 744.

The patent chiefly relied on by the defendants is the one granted to George Boxley, January 29, 1878, No. 199,615. The judge of the Circuit Court carefully considered this patent and the machine alleged to be built under it, and, as we agree, in the main, with his conclusions it is unnecessary to repeat what he has so well and care-

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fully stated. The admission by the defendant that the Boxley patent does not disclose the fourth element of the claims as stated, supra, removes it at once from the list of anticipating references.

The Circuit Court did find, however, that the Boxley machine was capable of being used to perform this pressing operation by withdrawing and raising the templet and then extending the blades of the templet and lowering it upon the blades of the infolders still extended over the folded edges of the blank. Although such use was possible the court was not satisfied that the machine ever was so used and was of the opinion that it was not constructed for such use and if so used it would soon be worn out and destroyed. This view is, we think, as liberal for the defendants as the proofs warrant. The Boxley prior use has not been established beyond a reasonable doubt for the following reasons:

First. It is most improbable that a machine which could do the work of the Pine machine would be permitted to go out of existence when skillful men, knowing the needs of the business, were searching for such a machine.

Second. No writing supports the defendants' contention and human memory is not to be relied upon as to minute details of transactions occurring twenty-five years before. Keasbey & M. Co. v. Carey Mfg. Co. (C. C.) 139 Fed. 571, and cases cited.

Third. The omission of the pressing mechanism from the specification, which was prepared after the machine had been in operation and was well understood by the patent solicitor, is most significant, and the same is true of the 1882 patent to Boxley.

Fourth. The machine as constructed was not adapted to accomplish the pressing work, the edge portions of the templet plates, which were to force the infolders down upon the folded edges of the blanks, to be pressed between them and the bed, were thin and flexible and were supported far from their operative edges. In other words, they were wholly unsuited to do the heavy work of pressing the edge portion of the folded blanks.

Fifth. Various other matters of construction in the Boxley machine tend to strengthen the conclusion that it was not intended to accomplish the purpose of the Pine machine in the particulars under discussion and that it was incapable of being so used as a practical operative device.

Of course, if it be true that Boxley, even though ignorant of the fact, had previously made a machine capable of doing the work of the Pine device in the same way, the patent of the latter cannot be sustained. But, on the other hand, if Boxley intending to accomplish a different result ignorantly stumbled upon a structure which, in the light of Pine's achievement, can be distorted into a temporary and inefficient substitute for the successful machine, quite a different proposition is presented. If Pine did nothing more than take an old abandoned failure and, by the introduction of new and ingenious features, no matter how simple they may be, convert the rusty relic into a living machine which does the required work better, faster, cheaper than it was ever done before, he is entitled to the protection which his

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patent is intended to give. Potts & Co. v. Creager, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275; Clough v. Barker, 106 U. S. 166, 1 Sup. Ct. 188, 27 L. Ed. 134. Pine seems to have added to the prior devices the one feature necessary to make the machine a marked commercial success.

The patents to Norris, No. 502,678, granted August 1, 1893, and No. 520,535, granted May 29, 1894, are exceedingly complicated and their operation is not made altogether clear by the experts or the models. It would seem, however, that the press plate of the Norris machine is not collapsible and that in drawing it out the folded blank will be disarranged. It also appears that the machine is incapable of folding and pressing the folds on all sides of the blank and that it is capable of acting only upon a limited variety of blanks.

The Rumrell patent, No. 64,038, granted April 23, 1867, for an improvement in machines for making book covers, belongs to a different art and fails to disclose the combination of the claims of the Pine patent in controversy. Assuming that Pine had knowledge of the complicated device of Rumrell and adapted it to do successful work in the collar and cuff industry we are by no means sure that the language of the Supreme Court in Potts v. Creager, supra, would not apply:

> "It often requires as acute a perception of the relations between cause and effect, and as much of the peculiar inventive genius which is characteristic of great inventors, to grasp the idea that a device used in one art may be made available in another, as would be necessary to create the device de novo."

A mere mechanic could learn nothing from Rumrell which would enable him to construct the Pine machine. He might find some valuable suggestions for minor mechanical details, but not the combination which makes the Pine machine successful. The Rumrell specification says:

> "The press plate so prepared is brought down again, and this time on top of the fold, which is thereby pressed to the cover, and, being covered with paste, will be firmly secured."

The pressure here referred to is apparently that imparted by the hand of the operator. This is not the action of the Pine structure where folds are pressed between the infolders and the support. Topliff v. Topliff, 145 U. S. 164, 12 Sup. Ct. 825, 36 L. Ed. 658. We have grave doubt whether the Rumrell device could without several important changes, be adapted even for inefficient use in the art of folding cuffs and collars.

The Wenstron patent, No. 298,643, granted May 13, 1884, for a hat rounding machine, belongs to an art still more remote, and, so far as we can see, is wholly irrelevant to the present controversy. It shows, what no one has controverted, that prior devices somewhat similar to the templet of the patent had been made to expand and contract.

The McKinney and Shippee patents (Nos. 485,130, 463,171, respectively) have only a remote bearing upon the question at issue. This may be demonstrated by quoting from the Shippee specification that portion which is said to approximate most closely the Pine combination. It is as follows:

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"The folding plates having been closed, the operator with his left hand will pull the form-plate longitudinally out from between the folding and clamping plates and out from the edge folds of the blank or material just laid over it leaving the folded edges $m^1$ held clamped between the plates a and b where the folded edges are closely creased."

The foregoing are the principal patents relied on to defeat the patent in suit. If singly or combined they are ineffectual to accomplish this result the other patents in evidence, which are still more remote, will not aid the defendants. The Pine patent is for a combination and it is enough to say that this combination is not, in our judgment, disclosed by any of the prior patents in evidence.

It is alleged that one George A. Brockway made a machine prior to the date of Pine's invention, which was a complete anticipation at least of the combination of claim 4. The complainants assert that the Brockway machine was not made before, and even though it were so made the proof is insufficient to establish prior use. Upon both of these propositions the burden is on the defendants and it is enough to say that there is sufficient doubt as to the details and date of the Brockway machine to warrant us in rejecting it as an anticipation.

We have already adverted, when dealing with the Boxley machine, to the unsatisfactory character of testimony depending upon the unaided recollection of witnesses of events occurring years previous. Courts are loth to destroy a patent upon testimony so unreliable. It suffices to say that the defendants' testimony is neither clear nor convincing. We are in doubt as to its truth.

It is said that Garry J. Dormandy was the sole inventor or the joint inventor with Pine. The Patent Office, after full hearing, granted the patent to Pine which is at least prima facie evidence that he was the inventor. The court must be convinced by strong and satisfactory proof that Dormandy was sole or joint inventor before destroying the patent. Pine, having disclosed his invention to Dormandy, in the spring of 1893, and, having employed the latter as his machinist to construct the machine, the presumption is strong against Dormandy's contention that he supplied the brains which made the machine operative, especially after the Patent Office on interference had decided in favor of Pine and against Dormandy.

The question is at best a technical abstraction. No rights of rival inventors are involved, as the complainant, the Shirt & Collar Company, was assignee of both Pine and Dormandy, and that company, with full knowledge of the facts, took the patent, in accordance with what appeared to them to be the truth, in the name of Pine. A decision against Pine now will benefit infringers but will be no benefit to Dormandy. We think the testimony fails to establish the defendants' contention; on the contrary it shows that Pine first conceived the invention and employed Dormandy to carry it out. Read as a whole. in connection with the position, character and intelligence of the two men, respectively, as disclosed by the record, the history of the invention makes it quite clear that the inventive faculty was Pine's, the mechanical skill Dormandy's. "Every machine before it can be used must be constructed as well as invented. If one man does all the inventing and another does all the constructing, the first is the

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sole inventor." Walker on Patents, § 46; Agawam Co. v. Jordan, 7 Wall. 583, 602, 603, 19 L. Ed. 177. We think the proof sufficient to connect the defendants with the machine known as "Complainants' Exhibit Defendants' Machine."

The bill of complaint is "against William Beattie and Walter J. Beattie, both citizens of the state of New York, jointly doing business under the firm name and style of William Beattie & Son, and having a place of business at Cohoes, in the said Northern district of New York." The answer admits this. On July 5, 1902, the machine in evidence was purchased and a bill rendered to the purchaser, which contains among other statements the following printed matter:

"Beatties' Machine Works. W. Beattie & Son. W. Beattie, W. J. Beattie. Cablegram 'Beattie.' Sole Manufacturers of Beatties' Patent Loopers, Cohoes, N. Y."

On July 17th Beatties' Machine Works acknowledged receipt of $380.44, the amount of the bill of said machine. It is true that this proof might have been more specific and probably would have been if the complainants had anticipated that an attack would be made upon it for the first time in the appellate court. It is asserted, and not denied, that throughout the entire litigation in the Circuit Court the exhibit in question was treated as having been sold by the defendants. The name "Beattie" appears six times on the bill-head and if the complainants had had the slightest hint that a distinction existed between "W. Beattie & Son" and "Beatties' Machine Works" they could have offered proof showing their indentity. We are of the opinion that the complainants made out a prima facie case. Hutter v. De Q. Bottle Co., 128 Fed. 283, 285, 62 C. C. A. 652.

It is conceded by the defendants that the machine referred to supra infringes the first three claims of the Pine patent. It is argued, however, that it does not infringe claim 4 for the reason that it does not employ "infolders constructed to move inwardly and outwardly on all sides simultaneously." This contention gives, we think, an unnecessary strict construction of the word "simultaneously," which means "at the same time," and if the infolders, at any time during the operation, move simultaneously they are within the claim, even though their respective movement may begin and end at different times. As is said by the complainants' expert:

"By the same continuous operation of the operating handle, the four infolders are simultaneously moved and continuously from start to finish. I do not understand, however, that the actual folding of each edge of the blank is performed in precisely the same time as the rest. The folding is, however, accomplished on all edges of the blank by the same operative movement of the single operative handle."

We are of the opinion that infringement of the fourth claim is established.

The decree is affirmed.

On Rehearing.

PER CURIAM. After careful examination of the questions presented at the reargument, we are constrained to adhere to our former opinion that the claims in controversy cover patentable combinations and are not for mere aggregations.

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(149 Fed. 743.)

## AMERICAN CARAMEL CO. v. THOMAS MILLS & BRO.

(Circuit Court of Appeals, Third Circuit. December 3, 1906.)

No. 36.

1. PATENTS—INVENTION—TESTS.

While utility is not necessarily a test of invention, it may help to determine the question, increased efficiency being accepted as an important factor, and it is also regarded as significant that there has been a recognized need of such a machine as that of the patent, and that the efforts of others to meet it have been without success which the patentee has attained only after continued experiment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 39.]

2. SAME—PRIOR PUBLIC USE.

A patent is not invalidated because a machine like that of the patent was made and used by the patentee more than two years before the application was filed, where such use was for the purpose of experiment only, nor is such use a public use, which will defeat the patent because the product of the machine during the time was sold.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 103.]

3. SAME—INVENTION AND INFRINGEMENT—CANDY CUTTING MACHINE.

The Hershey patent, No. 532,554, for a machine for cutting candy, covers a combination which was new, although the elements were old, and discloses patentable invention; the machine being of greater efficiency than any of the several which preceded it in the art. Also *held* valid as against the claim of prior public use, and infringed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 138 Fed. 142.

Henry E. Everding, for appellant.

A. B. Stoughton and Henry P. Brown, for appellee.

Before DALLAS and GRAY, Circuit Judges, and ARCHBALD, District Judge.

ARCHBALD, District Judge. The patent in suit is for a machine to cut caramels and other similar candy products issued to M. S. Hershey January 15, 1895. The bill was dismissed upon the ground that there was nothing patentable in the device; all the elements being old, and there being no invention in putting them together in the way that was done. (C. C.) 138 Fed. 142. The machine consists in a stationary table, suitably supported, having a transverse slot or opening, through which a feed roller projects upwards from below, and over which a blade roller, armed with circular cutting discs or knives, is hung, conformably to the feed roller; the two being so geared and journaled that their meeting surfaces move forward together in the same direction. To carry the material to be cut, a blade or pad is provided, which is drawn with such material, along the table as a rest or guide, between the cutting and the feed rollers, by the frictional action of the same, during the course of which operation the cutting takes place. The table may be level, or may incline from the feed to the delivery end; and the rollers may or may not be vertically adjustable to suit different thicknesses of the candy. The plate or pad is preferably made of some



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flexible and yielding material, such as pasteboard, blotting paper, felt, or rubber, into the surface of which the knife edges are arranged to sink or bite, so as not only to insure a clean and complete cut, but to assist in moving the pad forward through the rollers, by frictional contact with the blades. By the projection of the feed roller through the slot in the table, an arching of the pad is also produced at the point of contact with the knives, which adds to the efficiency of the operation.

The claims of the patent are as follows:

"1. The combination, with a slotted table, of a shaft having blades and journaled above said slot, a roller journaled below the slot, said shaft and roller being so geared that their adjacent parts move in the same direction, and a plate or pad adapted to be drawn between said blades and the roller by the frictional action thereof, for the purpose specified.

"2. The combination, with a slotted table, of a shaft having blades and journaled above said slot, a roller journaled below the slot, said shaft and roller being so geared that their adjacent parts move in the same direction, and a flexible plate or pad adapted to be drawn between said blades and the roller by the frictional action thereof, for the purpose specified.

"3. The combination, with a slotted table, of a vertically adjustable shaft having blades and journaled above the slot, a roller journaled below the slot, said shaft and roller being so geared that their adjacent parts move in the same direction, and a flexible plate or pad adapted to be drawn between the blades and the roller by the frictional action thereof, substantially as and for the purpose specified."

The only difference in these claims is that in the second and third the pad is flexible, and in the third the cutting shaft is vertically adjustable.

No such combination, as is so specified, is to be found in the prior art, however the different elements of which it is composed may appear there. The Wunderle machine (unpatented), which is the first reference made, is a very old and primitive affair, built in 1874, in which there is nothing but the merest rudiments. It was used for fig paste, and consists simply of an upper shaft, vertically adjustable, with large circular disc-like scoring or cutting blades, and a smaller under roller, the material to be cut being put through between the two, on a board, first in one direction, and then at right angles, so as to divide the paste into squares. The two rollers are independent of each other, and not geared together as in the device in suit; the only function of the lower one being, as a slide, to facilitate the passing through of the board which carries the material. And, as further distinguishing it from the present device, there is no table of any kind, slotted or otherwise, nor is the board flexible, like the plate or pad specified in the second and third claims. This machine, also, after having been used by Wunderle for a couple of years was thrown aside, his competitors, as he says, getting out a better looking and more salable candy than he could by means of it; and it was sold soon afterwards to the defendants, in whose stockroom it has been stored away ever since, unnoted and unused, until resurrected for the purpose of this suit. Whatever virtue, therefore, it may have originally had, as it stands, it must be regarded as in the nature of an abandoned experiment, of which no notice need now be taken.

The so-called "chewing-gum machine"—also unpatented—is a stage in advance of this, but not by any means to the extent of being an

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anticipation. It was built by the defendants in 1889 for a factory in North Carolina, and upon the failure of that concern was taken back about a year later. Another was built about the same time for a Baltimore man, and still another for Mr. Hershey, the present inventor. It has the usual upper and lower rollers, which are geared together, the former being vertically adjustable, and being provided with blunt circular scoring blades or edges, with transverse, or cross, edges at intervals. There is no slotted table, however, although it must be confessed that the shelf or rest and the sloping discharge slide, on opposite sides of the lower roller, come pretty near to that. But distinctly there is no pad; the material being its own conveyor, and being fed into the machine on one side and allowed to shoot down the slide on the other. And it is, moreover, essentially a scoring and not a cutting machine; the gum or candy still remaining in a sheet, the cutting edges only going partially through it. Nor is this materially different in the modified form, with knives instead of scoring edges on the upper roller. And whatever its efficiency with chewing gum, as used by Hershey for caramels it was not successful. The only other machine in the immediate candy cutting art which calls for notice is the B. Parker (1883). This was a cutting, and not a mere scoring, machine, as argued; the knives going clear through, although a pasteboard pad was sometimes required to hold the material up to the knives, in order to have them do so. It was the one successful caramel cutting machine prior to that in suit, and was expressly designed for that use. It was extensively employed by Hershey in his factory, and it was in fact by his experiments with it that he came to invent his own machine. Notwithstanding this, however, the two are not at all alike; the only things in common being the upper vertical adjustable cutting roller and the removable pad or board on which the material is placed. There is no under or feed roller, and, instead of a stationary slotted table, there is a traveling carriage, on which the boards are set, and by which the material is carried under the knives. The carriage and the cutting roller are geared together, and both move forward at the same time, but not at the same rate; the cutting edges being given a greater velocity, in order to make a better cut. Certain leather embossing and cutting machines are also referred to, which have some common features, and to a certain extent act in the same general manner as the Hershey, but they deal with a different character of material, which presents different conditions, calling for different treatment, and do not need to be specially considered. The same is true of the Baumgartner noodle cutter (1874), the only significance of which is that it shows an arched flexible strawboard plate or pad, into the surface of which the knife edges cut or bite, making this feature and function old.

From this review of the prior art, it thus appears, as already stated, that there was nothing which directly anticipated the present device. No doubt the instrumentalities made use of by the inventor were at hand, cutting machines being found in various arts, with knives, and rollers, and tables or beds, and flexible pads, similarly, if not suggestively, used. But that does not dispose of the one in hand. The combination which is there found is new; and the only question is whether

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it amounted to invention to put together the elements made use of in the way that was done. It is not easy to say in any case what does and what does not constitute patentable invention; and it is a delicate matter to declare that a device, although novel, is devoid of it. Utility is not necessarily the test. McClain v. Ortmayer, 141 U. S. 419, 427, 12 Sup. Ct. 76, 35 L. Ed. 800. Although it may help to determine the question; increased efficiency being accepted as an important factor. Webster Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177. So, also, is it regarded as significant that there has been a recognized need for such a machine, and that the efforts of others to meet it have been without success, which the inventor has attained only after continued experiment. Gandy v. Main Belting Co., 143 U. S. 587, 594, 12 Sup. Ct. 598, 36 L. Ed. 272. All these are considerations which are of force here, not in a large way, it may be, but sufficiently. At least three different and distinct attempts, by as many parties, were made, as we have seen, to produce a candy-cutting machine of this character, none of which was altogether satisfactory; one, however, being regarded as of sufficient merit to receive a patent. On account of the imperfect work turned out by the best of them, Hershey set about to see whether he could not get up something which would answer. To this end he conducted extended experiments, with not a little outlay of money, before he got what he thought would do, the result of which was a marked success; the production of the factory being increased from three to five fold, and considerable labor at the same time dispensed with. The machine makes a clean and thorough cut—the essential thing—and operates with such accuracy that a definite number of caramels are able to be taken without being weighed to make up pound and half-pound packages, materially saving in the work of handling and packing them. There are also other advantages, operative and functional, some of which have been alluded to above, on which it is not necessary to dwell. Taking all things into consideration, a case would seem to be presented in which the exercise of inventive faculty was shown. The mechanism, of course, is not intricate, and a high order of invention may not be involved. It also, no doubt, follows the same general lines already marked out by others, in this and other arts, from which, indeed, there is little opportunity to depart. But, unless the possibility of there ever being anything patentable in candy cutting machines is to be denied, it would seem to be found here. Not only is there a judicious selection by the inventor of the mechanism employed, but there is a discriminating adaptation of it to the work to be performed, which suggests something more than the mere skill of the ordinary mechanic, and partakes rather of the inventive insight and discovery which it is the design of the patent law to foster and protect. A presumption exists in favor of the device by reason of the patent granted to it. But without resting the case upon that we are of the opinion that actual inventive merit is shown sufficient to meet the requirements of the law, and that it should have been so held in the court below.

It is urged, however, that the patent is invalid, because the machine was in public use for over two years before the patent was applied for.

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Not only is this not negatived, as it is said, by the usual affidavit required of inventors—that executed by Hershey being made August 24, 1892, nearly nine months before the application, leaving a gap which is thus uncovered—but is conceded, also, by Hershey in his testimony, the machine having been used, as he says, in his factory since the spring of 1891, to which he admits that he did not know there was any objection. But in whatever uncertainty the subject may seem to be left by that which is so referred to, it is put at rest by the other evidence. The first two machines which were designed for commercial use were built by Blickenderfer by contract, and were not completed until October 31, 1891; the patent being applied for May 3, 1893, a year and a half later. This is established beyond controversy by the charges in Blickenderfer's books, and is confirmed by his testimony, as well as by that of Blair, Robinson, and Brooks, all of whom agree. There was no doubt an earlier machine, more or less complete, which was being experimented with, from along in March up to the latter part of August, 1891, when it was found to work satisfactorily, and it is to this that Hershey evidently refers. But the use made of it was purely experimental, and does not count. Nor is this affected by the fact that caramels cut on it were sold. Elizabeth v. Pavement Co., 97 U. S. 126, 24 L. Ed. 1000; Bryce v. Seneca Glass Co. (C. C.) 140 Fed. 161. It is denied that there were any such sales. But, assuming that there were, the caramels did not have to be thrown away to escape the charge of a public use.

The patent being valid, infringement is clear. The defendants manufacture two kinds of machines, the one for hand and the other for steam power. In the hand power machine the duplication beyond question is complete, and so also, in our judgment, is it in the steam power, the exact combination claimed in the patent appearing in both. A distinction is sought to be made in the latter that the cutting blades and the feed roller, instead of being one larger than the other, as in the Hershey machine, are both of the same size, and are so geared together that the feed roller runs faster, dominating the motion of the material, the other being confined to the single function of cutting, where in the Hershey it is arranged to assist in feeding also. This, as it is claimed, is a material difference; Hershey having gained his patent on the assertion of the frictional contact of blades and pad, by which the latter is positively moved. No doubt this functional advantage was claimed in argument in the Patent Office, and not a little made of it there. And it was also put into the specifications, where it now appears, before the patent was allowed. But at the most it is merely descriptive of the supposed action of the machine, and not a limitation upon it, to which the inventor committed himself; there being no amendment or restatement of the claims by which the invention was defined. It is the mechanical combination there specified which is patented, and not the particular functions or advantages claimed for the different parts; and infringement is not escaped where there is a substantial appropriation of the mechanical construction, even though, by slight variations, unimportant changes in the mode of operation may be made.

The decree is reversed, with directions to reinstate the bill and grant the relief prayed for.

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(148 Fed. 683.)

## MEILY CO. v. LONDON & LANCASHIRE FIRE INS. CO.

(Circuit Court of Appeals, Third Circuit. December 3, 1906.)

No. 12.

INSURANCE—ACTION ON POLICY BY CORPORATION—DEFENSE OF WILLFUL BURNING.

**Evidence which warrants a finding that the property of a corporation plaintiff was willfully burned by its president, who had full control of its affairs and was the owner of practically all of its stock, the remainder being owned by members of his family; that the business was on the decline, the lease about to expire, and the property overinsured; and that the overvaluation was participated in by other members of the family—is sufficient to charge the corporation with the act of incendiarism, and to constitute a defense to an action to recover the insurance.**[1]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 142 Fed. 873.

A. H. Wintersteen, for plaintiff in error.

Frank R. Shattuck, for defendant in error.

Before DALLAS, GRAY and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. This is a writ of error to the Circuit Court for the Eastern District of Pennsylvania. In that court the Meily Company, a merchandizing corporation, brought suit against the London & Lancashire Fire Insurance Company to recover on two fire insurance policies—one upon its store goods, and the other on its store fixtures. The insurance company defended, inter alia, on the ground the plaintiff had set fire to the store. The jury found for the defendant, and the plaintiff sued out this writ.

While there are numerous assignments of error, the case may be treated from the aspect well summarized in the brief of the plaintiff in error, viz.:

"The verdict was practically equivalent to a finding that the plaintiff corporation intentionally and fraudulently caused the fire, or knowingly participated in an act of incendiarism upon the stock and fixtures destroyed, and therefore it was not entitled to recover."

Now such verdict would be warranted if the jury found that George W. Meily, the president of the plaintiff company, was the actual owner of all of its stock and that he set fire to the store in question, or, in case he was not the sole owner, that he set fire to the store with the assent of his fellow shareholders; Kirkpatrick v. Allemania Fire Insurance Company (N. Y.) 102 App. Div. 327, 92 N. Y. Supp. 466. The testimony in the case is so voluminous, the trial lasting more than a week, that it cannot be here quoted at length; but we have carefully examined it all. Without referring in detail to the evidence, and noting the fact that there was testimony to the contrary, we find that facts were proved from which the jury could infer that the business of the plaintiff was on the decline to a marked

[1] See note at end of case.

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degree; that the lease had nearly expired and the landlord was unwilling to extend it; that the property was insured in excess of its value; that the plaintiff company was a family corporation; that the business was really George W. Meily's, and was carried on in corporate form as a cloak to shield it from his creditors; that the fire was caused by his incendiary act; and that the participation by his sons in the alleged overvaluation of the stock afforded ground from which the jury could infer their acquiescence in the alleged incendiarism. The jury having before it evidence of facts from which such inference could be drawn, "it is not within the province of this court to inquire, or by deduction to surmise, how the whole or any part of that evidence was dealt with by the jury." Lear v. United States, 147 Fed. 349, 77 C. C. A. 527. Such being the case, the testimony of the witness Sponsler tending to show the alleged incendiarism was properly admitted, and no error was made in the answer to the points.

The allusion in the charge to George W. Meily as the plaintiff was a mere verbal slip, which could not have misled the jury, in face of the clear and repeated statements therein that the Meily Company was the plaintiff.

The judgment will be affirmed.

## NOTE.

### Weight and Sufficiency of Evidence of Willful Burning by Insured as a Defense to Action on Insurance Policy.

[a] Where, in an action upon a fire insurance policy, the defense is that plaintiff set fire to the building, it may be established by a preponderance of evidence, although insufficient to exclude all reasonable doubt.

—(U. S. 1883) Carlwitz v. Germania Fire Ins. Co., Fed. Cas. No. 2,415a;
(Ill. 1886) Orient Ins. Co. v. Weaver, 22 Ill. App. 122;
(Me. 1893) Smith v. California Ins. Co., 85 Me. 348, 27 Atl. 191;
(N. Y. 1881) Johnson v. Agricultural Ins. Co., 25 Hun, 251.

[b] (U. S. 1868) In an action on a fire policy, the defense that the loss occurred through the negligence or willful purpose of the insured may be proved by circumstantial evidence.—Huchberger v. Merchants' Fire Ins. Co., Fed. Cas. No. 6,822 [4 Biss. 265], affirmed Merchants' Ins. Co. v. Huchbergers (1870) 79 U. S. (12 Wall.) 164, 20 L. Ed. 364.

[c] (U. S. 1874) Where a policy of fire insurance contains the provision that all fraud or attempt at fraud on the part of the insured shall cause a forfeiture of all claims under the policy, and in an action on the policy the defendants set up as a defense that the plaintiff burned or caused to be burned the property insured, the defense must be proved according to the rule in civil cases, by a preponderance of evidence, and not so as to exclude all reasonable doubt; but the weight of evidence must be clearly in favor of the defendant to vitiate the policy.—Howell v. Hartford Fire Ins. Co., Fed. Cas. No. 6,780.

[d] (U. S. 1874) In an action on an insurance policy, where the defendants allege that the plaintiff burned or caused to be burned the property insured, in weighing the testimony of parties who state that they were accomplices of the plaintiff in the alleged arson, the jury should consider the motives they may have had in falsely charging the plaintiff with the crime, whether their statements are consistent and true, whether it agrees with the statements of other witnesses, and whether the character of these witnesses is such that they would be fit instruments for such a crime; and the evidence of such accomplices must be supported by extrinsic facts and circumstances.—Howell v. Hartford Fire Ins. Co., Fed. Cas. No. 6,780.

[e] (U. S. 1878) The defense of arson must be made out by the insurer by a satisfactory preponderance of evidence.—Sibley v. St. Paul Fire & Marine Ins. Co., Fed. Cas. No. 12,830 [9 Biss. 31].

[f] (U. S. 1878) The fact that the insured had been tried and acquitted on a

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criminal charge of arson is of no weight in a suit on the policy, where arson is a defense.—Sibley v. St. Paul Fire & Marine Ins. Co., Fed. Cas. No. 12,830 [9 Biss. 31].

[g] (Ill. 1856) The defense of wrongfully burning the insured property by the insured himself, urged in an action on the policy, must be sustained by the same degree of proof as would be required to procure a conviction under an indictment for arson.—McConnel v. Delaware Mut. Safety Ins. Co., 18 Ill. (8 Peck) 228.

[h] (Ill. 1886) In a suit on an insurance policy there was evidence that plaintiff was not the real owner of the goods insured, but that they had been shipped to plaintiff by B., who at the time was in failing circumstances, and who shortly afterwards came to plaintiff's store and assumed almost entire control and management of it until the goods were destroyed by fire, about four months after the policy was issued. There was also evidence that the night policeman saw B. going from the part of the store where the goods were kept at 2 o'clock in the night, and about 15 minutes before the fire was discovered. B. left a house at which he had been playing cards at half past 1. *Held*, that the evidence strongly tended to show that B. had set fire to the goods.—Orient Ins. Co. of Hartford v. Weaver, 22 Ill. App. 122.

[i] (Ill. 1889) Where the company pleads that the plaintiff set fire to the building himself, it must prove such plea beyond a reasonable doubt.—Germania Fire Ins. Co. v. Klewer, 129 Ill. 599, 22 N. E. 489.

[j] (Ill. 1889) Where, however, such plea is joined with others that do not charge a criminal offense, it is error to instruct the jury that defendant must establish its other defenses by more than a preponderance of the evidence.—Germania Fire Ins. Co. v. Klewer, 129 Ill. 599, 22 N. E. 489.

[k] (La.) Circumstantial evidence, though insufficient to convict of arson, may yet be sufficiently strong to prevent a recovery on a policy, when the claimant is charged with having himself set fire to the premises.—(1838) Regnier v. Louisiana State Marine & Fire Ins. Co., 12 La. 336; (1844) Wightman v. Western Marine & Fire Ins. Co., 8 Rob. 442.

[l] (La. 1846) Where, in an action against an insurer for loss by fire, the defense is that the assured himself set fire to the premises, the evidence for the defense is not required to be as full and conclusive as would be necessary to support an indictment for arson.—Hoffman v. Western Marine & Fire Ins. Co., 1 La. Ann. 216.

[m] (La. 1865) Where, in an action on a policy of insurance, the defense is a charge of arson, which is to be proved by circumstantial evidence, the proof ought to be not only consistent with the prisoner's guilt, but inconsistent with any other rational conclusion.—Flynn v. Merchants' Ins. Co., 17 La. Ann. 135.

[n] (Me. 1853) Where an insurer, after a loss, is sued as trustee of the insured, and pleads that the property was burned by the insured by design or through his gross carelessness, the evidence to establish the burning by design must satisfy the jury beyond a reasonable doubt, and to establish the burning by gross negligence there must be full proof.—Butman v. Hobbs, 35 Me. 227.

[o] (Me. 1877) In an action of case upon a fire policy, the jury were instructed that they should require more evidence to prove that a party set fire to his buildings to defraud an insurance company than to establish payment of a note or to prove an account in set-off. *Held* not to be error. To overcome a strong presumption requires more evidence than to overcome a weak one.—Decker v. Somerset Mut. Fire Ins. Co., 66 Me. 406.

[p] (Mass. 1854) In an action on a policy of insurance against loss by fire, the defense relied on was that the fire was occasioned by the willful and fraudulent act of the plaintiff. The judge refused to instruct the jury that they must be satisfied of the truth of this defense beyond a reasonable doubt, but did instruct them that they must be satisfied as reasonable men before they could find for the defendants. The judge also ruled that the character of the plaintiff was not necessarily involved in the issue; that it was not necessary for the defendants to show that the plaintiff had committed any indictable offense, but that it would be sufficient to show that the plaintiff had purposely and wantonly set fire to the property insured; and that, if he had thus set fire to it, he could not recover for the loss. *Held*, that the plaintiff had no ground of exception.—Schmidt v. New York Union Mut. Fire Ins. Co., 67 Mass. (1 Gray) 529.

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[q] (N. J. 1868) Where the defense in an action upon a policy of insurance against fire is that the plaintiff set fire to the property himself, it must be established by clear and satisfactory proof.—American Mut. Ins. Co. v. Anderson, 33 N. J. Law (4 Vroom) 151.

[r] (N. J. 1868) Where the defense, in an action on a policy of fire insurance, that plaintiff set fire to the property himself, is supported by one witness only, who details the circumstances relied on, and the circumstances are not of a conclusive character, a new trial will be refused.—Anderson v. American Mut. Ins. Co., 33 N. J. Law (4 Vroom) 151.

[s] (N. J. 1877) In an action on a fire policy, where the defense is that the property was willfully burned by insured, the rule as to the amount of proof required is as in civil, not criminal, cases; and a charge that defendant must establish the defense beyond a reasonable doubt, and by the same measure of proof that would be necessary to convict plaintiff, were he on trial on an indictment charging the offense, is erroneous.—Kane v. Hibernia Ins. Co., 39 N. J. Law (10 Vroom) 697, 23 Am. Rep. 239, reversing (1876) 38 N. J. Law (9 Vroom) 441, 20 Am. Rep. 409.

[t] (Ohio, 1899) Evidence that, after the fire, coal oil, in considerable quantities, was found to have been scattered about the store and on the goods, is not sufficient to warrant reversal of a judgment in favor of insured against insurance companies, where such evidence, as to quantity of oil, etc., is more or less conflicting, and the effect of such testimony is more or less rebutted by evidence showing that lamps were used in the store, and that the lamps and other furniture were broken, and the oil scattered about, by the force of streams of water which were thrown while the fire was in progress.—Connecticut Fire Ins. Co. v. Carnahan, 10 O. C. D. 186.

[u] (Wash. 1893) In an action on a fire insurance policy, in which defendant charged that the fire was intentionally caused by plaintiff, and, while bringing no direct evidence to that effect, showed various circumstances tending to prove it, it was error to refuse to charge "that fraud may be proved by circumstantial evidence, as well as positive proof," and that "when fraud is charged, as is done in this case, it may be inferred by strong presumptive circumstances."—McWilliams v. Cascade Fire & Marine Ins. Co., 7 Wash. 48, 34 Pac. 140.

[v] (Wis. 1858) The proof to show that the plaintiff set fire to his own house, in a suit against the insurers, need not be strong enough to convict him of arson, nor sufficient to satisfy the jury beyond a reasonable doubt.—Washington Union Ins. Co. v. Wilson, 7 Wis. 169.

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(148 Fed. 1022.)

## UNITED STATES v. AULTMAN CO.

(Circuit Court of Appeals, Sixth Circuit. December 31, 1906.)

No. 1,563.

ALIENS—CONTRACT LABOR LAW—PERSONS TO WHOM APPLICABLE.

The alien contract labor law, as amended in 1903 (Act March 3, 1903, 32 Stat. 1214, § 4, c. 1012 [U. S. Comp. St. Supp. 1905, p. 277]), does not apply to a man who entered the United States as an immigrant from Germany when young and remained continuously domiciled and working in this country for 12 or more years, although without becoming naturalized, and who then went temporarily into Canada, where he had been for two weeks when the contract alleged to be in violation of the statute was made.

[Ed. Note.—Importation of contract labor, see note to United States v. Parsons, 66 C. C. A. 133.]

In Error to the District Court of the United States for the Northern District of Ohio.

Action for penalty for violation of alien contract labor law.

At Law. The plaintiff and defendant having rested, the testimony

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being all before the court, counsel for the defendant moved the court for a nonsuit, and that the court direct the jury to return a verdict for the defendant. This the court did and plaintiff appeals.

The opinion filed below, and here reprinted from 143 Fed. 922, was in full as follows:

TAYLER, District Judge (orally). This action is based on sections 4 and 5 of the act to regulate the immigration of aliens into the United States. Act March 3, 1903, c. 1012, 32 Stat. 1214 [U. S. Comp. St. Supp. 1905, p. 277]. The claim is that the defendant, in violation of that law, solicited and procured the importation of one Hermann, an alien, from Canada. Since the observation of the district attorney as to changes in the law since its original passage, or since the time when the decisions referred to were rendered, I have looked at the statute with a view of finding out what changes were made as respects the question involved in this case, but I do not find that there has been any such change. There have been advances made in the law, with a view of more fully carrying out its purposes, and especially the law has been carefully amended since those decisions. This is an important circumstance, as will hereafter be noted. Section 4 provides that it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any alien into the United States, in pursuance of any offer, solicitation, promise, or agreement, parol or special, express or implied, made previous to the importation of such alien, to perform labor or service of any kind, skilled or unskilled, in the United States. The law has been since its original passage just as it is now in section 4, except that it adds unskilled labor to the classes covered by it, and has more carefully disclosed the unlawful methods by which the purpose sought to be accomplished may be carried out, by adding the word "solicitation." So that section 4 in its present form represents the results of the experience of intelligent men, determined to see that the purpose of the law was expressed in the law itself, and carried out. Then section 5 provides, in substance, for the penalty which shall be incurred for every violation of any of the provisions of section 4 of this act.

Now, the statute seems to be clear and explicit in its terms; and it was not until the witness Hermann had testified that he had come into this country from Germany in 1891, when he was quite young, and had remained constantly in this country, working at his trade almost all the time, never outside of the country until a couple of weeks before this transaction occurred which is the subject of this petition, that my attention was arrested and directed to the question as to whether or not such a person was included within the terms of this act. I say "arrested," because this provision of the law has been familiar to me for a long time, though not in its exact phraseology, and I have been especially familiar with, and deeply interested in, the purpose for which the law was passed, and had a familiarity, greater or less, with several of the amendments, including the last one, which was passed in March, 1903. So, as I say, my attention

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was arrested by that situation, and I tried, as well as I could, to reason out the proposition whether or not a man with this history was to be included within the provisions of this law, and a contract made with him, under the circumstances that existed here, prohibited by the law. Now, I thought that I understood what the purpose of this law was. It was intended, primarily, to prevent persons who are dissatisfied with the wage level of this country going into some other country, where the wage level was lower and where the promise of higher wages in this country would be extremely attractive, and where, on that account, it would be easy to make a contract with a person thus working for lower wages to come into this country and work for higher wages, with the result that, by making a contract at a rate of wages higher than the rate at which the alien was working, and lower than the prevailing, and through our civilization the necessarily prevailing rate of wages, the wage level in this country would be demoralized; and, as the wage level in this country determines the level of civilization in this country, very serious wrong would be done, not merely to labor, but to society, which, in its units, is almost all made up of labor. That was the general condition of things which demanded this legislation as a protection to society, and to the civilization which depends upon the amount that men earn, and therefore the amount that men spend. We are all familiar with the rule that, where it is possible to do so, a law must be construed in accordance with its spirit, and that a penal law is to be strictly construed. Those are elementary propositions.

The first case that I found during the recess was the case of Moffitt v. United States, 128 Fed. 375, 63 C. C. A. 117. That was a case under the immigration law; and the syllabus, which fairly states the substance of the decision in that respect, says:

"The immigration laws of the United States, in so far as relates to punishment for their violation, are highly penal, and are to be strictly construed, and their provisions applied only to cases clearly within their terms and their spirit, construed as a whole."

"We are of opinion," says the Circuit Court of Appeals in the text, "that this act clearly relates to immigration, and is leveled only against immigrants, although neither of these words is expressly mentioned in section 10 of the act. Section 3 excludes the encouragement of immigration to this country of aliens by promise of employment. Section 4 makes it unlawful for steamships or transportation companies or vessel owners, by writing or otherwise, to solicit or encourage the immigration of aliens into the United States, except in certain specified particulars. Section 6 forbids the bringing into the United States of any aliens not lawfully entitled to enter, and punishes the offense," and so on. And on page 380 of 128 Fed., and page 122 of 63 C. C. A.:

"Where the intent of the statute is plain, nothing is left to construction; but where the mind of the court must labor to discover the design of the Legislature it seizes upon everything from which it can be derived. In this search courts should not overlook nor ignore the well-known canon of construction, which often proves to be a safe guide in determining the meaning of the statutes. The rule is universal, in cases of this character, that the evil which Congress intended to remedy must be looked at. All

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the circumstances, conditions, and contemporaneous events which induced Congress to pass the law must be considered and given due weight."

Now the law, in respect to its application, what persons it applied to, has been considered in that sense in two aspects: First, to define what kind of persons, measured by their employment, are included; and, second, to define what is meant by aliens or immigrants. Those two phases of qualities which must inhere in the person whose contract is subject to consideration have been considered. On the first proposition we have the case of Holy Trinity Church v. United States, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226. That case passed upon the question of the kind of employment or work which the person who it was said was being imported in violation of law was engaged in. That is not our question here, but naturally the principles of law that govern that case would govern here. This is a very instructive and well-considered opinion by Mr. Justice Brewer, in which he held that a minister of a church was not included within the law. He is now excluded from its operation by the amendment to the law; but at that time there was no such exclusion. A contract had been made in England with a minister to go to New York and take charge of the spiritual affairs of a certain church. The courts below held that the contract was in violation of this law, and the case went to the Supreme Court for determination. Justice Brewer says (on page 458 of 143 U. S., and page 511 of 12 Sup. Ct. [36 L. Ed. 226]):

"It must be conceded that the act of the corporation (that is, of the church corporation) is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words 'labor' and 'service' both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added 'of any kind'; and, further, as noticed by the circuit judge in his opinion, the fifth section, which makes specific exceptions, among them professional actors, artists, lecturers, singers, and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section. While there is great force in this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."

Continuing the reasoning (on page 463 of 143 U. S., and page 513 of 12 Sup. Ct. [36 L. Ed. 226]), Justice Brewer says:

"Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body. The situation which called for this statute was briefly, but fully, stated by Mr. Justice Brown when, as district judge, he decided the case of United States v. Craig (C. C.) 28 Fed. 795, 798: 'The motives and history of the act are matters of common knowledge. It had become the practice for large capitalists in this country to contract with their agents abroad for the shipment of great numbers

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of an ignorant and servile class of foreign laborers, under contracts, by which the employer agreed, upon the one hand, to prepay their passage, while, upon the other hand, the laborers agreed to work after their arrival for a certain time at low wages. The effect of this was to break down the labor market, and to reduce other laborers engaged in like occupation to the level of the assisted immigrant. The evil finally became so flagrant that an appeal was made to Congress for relief by the passage of the act in question, the design of which was to raise the standard of foreign immigrants, and to discountenance the migration of those who had not sufficient means in their own hands, or those of their friends, to pay their passage.'"

So, also, we find quoted in this opinion a part of the report made by the committee of the House which recommended the passage of this very legislation in the Forty-Eighth Congress. That committee said:

"It seeks to restrain and prohibit the immigration or importation of laborers who would have never seen our shores but for the inducements and allurements of men whose only object is to obtain labor at the lowest possible rate, regardless of the social and material well-being of our own citizens, and regardless of the evil consequences which result to American laborers from such immigration. This class of immigrants care nothing about our institutions, and in many instances never even heard of them. They are men whose passage is paid by the importers. They come here under contract to labor for a certain number of years. They are ignorant of our social condition, and that they may remain so they are isolated and prevented from coming into contact with Americans. They are generally from the lowest social stratum, and live upon the coarsest food and in hovels of a character before unknown to American workmen. They, as a rule, do not become citizens, and are certainly not a desirable acquisition to the body politic. The inevitable tendency of their presence among us is to degrade American labor, and to reduce it to the level of the imported pauper labor."

Ending the quotation, and continuing with the language of Mr. Justice Brewer, is this sentence:

"We find, therefore, that the title of this act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, the reports of the committee of each house, all concur in affirming that the intent of Congress was simply to stay the influx of this cheap unskilled labor."

Now, I must confess that, having read so much of that opinion, I could not escape the conviction that the Supreme Court of the United States would have greater difficulty in excluding from the language of that act a minister than it would have to exclude a person like Hermann from the act. It seems to me that the reason that was applied by the Supreme Court in that case would apply with double force to the case that we have here; and to that conclusion, subject to further reflection and the argument that might be presented, I had come when my attention was called to what I had not had time to find—these cases where the United States courts have held, both in a contract labor case and in other cases where the definition of the persons who were included within this act was made, that a person who had come into this country, who had migrated to this country, had become a part of the wage-earning body of this country, in a sense had assimilated to our society, who, in a word, had become a resident and domiciled here, although not naturalized, could not be said to be a person with whom to make such a contract as here charged would

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be to violate this contract labor law. But we find that in many instances the courts have so held.

In Re Maiola (C. C.) 67 Fed. 114, Judge Lacombe held, as it is stated in the syllabus:

"The statutes of the United States relating to the exclusion of contract laborers, including the act of March 3, 1891, making the decision of the immigration officers final as to the right of such laborers to land, are directed solely against alien immigrants, not against alien residents returning after a temporary absence; and the courts, therefore, have power, upon habeas corpus, to inquire whether one who is refused admission to the country by the immigration officers is or is not an immigrant, and so within the jurisdiction of such officers.

"An unmarried man, who has immigrated to the United States in 1892, with the intention of making his home there, has remained about two years, working at his trade, and then, being taken ill, has returned to his native country, remained about 10 months, doing no work, and then in 1895 returns to the United States—is not an immigrant on his return in 1895."

There are three other cases cited to the same effect as to the definition of an immigrant. They are not contract labor cases, but they are under the same general law, the title of which I quoted at the outset.

In Re Panzara et al., 51 Fed. 275, it is held by the District Court for the Eastern District of New York that:

"The power of the federal superintendent of immigration to return passengers is confined to 'alien immigrants,' and the question whether persons ordered to be returned are of that description is jurisdictional, and may be determined by the courts on habeas corpus. One who is a resident of the United States, though of foreign birth, and not naturalized, and who is returning from a visit to the country of his birth, is not an alien immigrant within the meaning of the laws regulating immigration."

In Re Martorelli, 63 Fed. 437, Judge Lacombe, in the Circuit Court for the Southern District of New York, held:

"The acts regulating immigration, existing when Act March 3, 1891, was passed, refer to aliens who are imported into or who migrate to this country, and do not exclude a person already resident here, though not naturalized, who temporarily departs, with the intention to return."

The District Court for the Northern District of California, in Re Ota, 96 Fed. 487, held:

"The provisions of Act March 3, 1891, 26 Stat. 1084, c. 551 [U. S. Comp. St. 1901, p. 1294], excluding certain classes of aliens from admission to the United States, and requiring their deportation, do not apply to aliens domiciled in this country, and who are returning thereto after a temporary absence."

I must differ from these several judges who have defined this law and declared that such a person is not within the terms of the law, if I find that Hermann comes within it.

The facts in this case are infinitely stronger than the facts in any of the cases from which I have just quoted. In this case nobody would pretend that Hermann ever intended to go back to Germany to live, or that he was any less absorbed into the body of American workmen than anybody who had always lived here. He came here when he was about 17 years of age. He had worked some at the trade of coremaker, he said, before he came over; but he did not get to work at that in this country immediately, whatever he may

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have known about it before. But from 1891, when, a German boy, he landed in New York like any other immigrant, and was reported as an immigrant from Germany, from that moment until two weeks before he made this contract, if he made any at that time, until about two weeks before the 31st of July, 1902, he had never set foot outside of this country. From the age of 17 to 30 he had worked in this country; and, then, because he had been working as a strike-breaker, he went to Canada to help break a strike there, and there remained, as he said, a short time, two weeks, when he was called upon to assist in breaking a strike down at Canton. Now, was he an immigrant when he came over from Canada? Could the immigrant officers have stopped him? The unbroken current of authority is that he was not an immigrant within the meaning of this statute. I doubt if he would be an immigrant within the meaning of any statute. If he belonged anywhere, he belonged in this country, whatever technical relation he may have sustained to the Emperor of Germany.

Counsel refers to the fact that he was a strike-breaker, and that they are the kind of people that this legislation was intended to keep out. It is not worth while to discuss whether the work of the strike-breaker is virtuous, or the contrary. The legislation was not intended to touch the case of strike-breakers in the sense in which that argument was made. It was intended to reach strike-breakers, in the way of cheaper labor coming here at lower wages, as it would demoralize labor here, and most seriously and grievously affect the well-being of this country. But it was not intended to touch strike-breakers in the sense in which these men were strike-breakers, whatever we may think of such a trade, if there is such a trade.

The last of the four cases defining an alien immigrant was decided December 1, 1899. Since that time the law has been amended, especially by the act of March 3, 1903; and it is a familiar principle that when a certain construction has been given to a statute, especially when its general language has been qualified and subsequent legislation has not undertaken to change the language so as to meet with the judicial definition, added persuasiveness is given to the construction of the law which the courts have put upon it. That is to say, if Congress intended to give a wider application to the law than the courts had given to it, it is reasonable to assume that it would have so legislated when it came to amend the law after the decisions were made public.

I have no sort of doubt at all that, considering the title of this act, considering its various provisions, considering the conditions that brought about its passage, considering the state of the public mind regarding it, and its history, not to mention the other things which are of themselves conclusive, the decisions of the United States courts and the holding of the Supreme Court in the Holy Trinity Church Case—this person Hermann was not in 1903 a person with whom the act referred to prohibited the making of a contract. So that it would not make any difference whether a contract was made, or whether the defendant knew he was an alien in the sense in which he was an alien. It would not make any difference what the fact is as to that. The law could not be violated as respects this particular person.

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And for that reason, therefore, gentlemen of the jury, as no question of fact exists for your consideration, but only this question of law upon admitted facts of the case, and there is no confusion or uncertainty about the facts in so far as they relate to the proposition I have just determined, it will be your duty to return a verdict for the defendant, which is accordingly done.

John J. Sullivan, U. S. Atty.
John P. Morley, for defendant in error.

PER CURIAM. Action for penalty for violation of alien contract law. Judgment below for defendant affirmed, on opinion of Tayler, District Judge.

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(149 Fed. 954.)

## LYNCHBURG COTTON MILL CO. v. TRAVELERS' INS. CO. OF HARTFORD, CONN.

(Circuit Court of Appeals, Fourth Circuit. December 14, 1906.)

No. 654.

1. INSURANCE—ACTION ON POLICY—CONTRACT LIMITATION—WAIVER.

Where an employer's liability policy provided that an action thereon should be barred unless commenced within 30 days after the right of action accrued, but the insurer participated in negotiations for a settlement for a period of more than 90 days after the 30-day limitation had expired, the contract limitation was absolutely waived, so that on the termination of the negotiations for settlement the insured was only required to proceed within the statutory period to enforce its claim.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1543, 1551, 1553.]

2. SAME—EVIDENCE.

Where, in an action on an employer's liability policy, it was claimed that the suit was barred by a 30-day limitation clause, certain correspondence between insured and the local and state agents of the defendant company and between such agents themselves regarding the adjustment of the claim, which was a mere continuance of the same adjustment which the company admitted to have been conducting for 90 days after the 30-day limitation had expired, was admissible as bearing on the issue of waiver of such contract limitation.

In Error to the Circuit Court of the United States, for the Western District of Virginia, at Lynchburg.

For opinion below, see 140 Fed. 718.

On the 18th day of April, 1902, Fitzhugh Stanley, an employé of the Lynchburg Cotton Mill Company, was injured in the course of his employment; and on the 21st of April, 1903, he recovered a judgment for damages on account thereof, in the circuit court of Campbell county, against the cotton mill company for $5,000 and costs, which judgment was subsequently affirmed by the Supreme Court of Appeals of Virginia in March, 1904. At the time of the accident to Stanley, the plaintiff in error had an employer's liability policy issued by the defendant in error for an amount not to exceed $2,500 for injury to any one person; and in said policy the insurance company undertook to defend at its own expense, and in the name and on behalf of the assured, any suits for damages covered by its policy. The present

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suit was instituted by the plaintiff in error herein, in the corporation court of the city of Lynchburg, to recover from the defendant in error herein the sum of $2,732.93, being the amount claimed under the accident policy aforesaid as their liability on the judgment recovered by said Stanley. The case was by appropriate proceedings removed from the corporation court of Lynchburg to the United States Circuit Court for the Western District of Virginia. Upon the docketing of the same in the latter court the defendant pleaded nonassumpsit, and issue was joined thereon, and subsequently filed its special plea in writing setting up in bar of the plaintiff's right of recovery the 30 days' limitation within which suit should be brought, as prescribed by clause 14 of the policy sued on. To this special plea the plaintiff replied, setting forth certain correspondence had by and between it and the defendant company and its representatives, looking to an adjustment of the controversy, and whereby, as claimed by the plaintiff, the benefits of clause 14 of the policy were waived, and that in any event such compromise was not abandoned by the defendant until the 16th day of September, 1904, a period of less than 30 days before the institution of this suit. To this replication the defendant filed its rejoinder, likewise setting forth a letter from defendant's counsel to the plaintiff, dated the 16th of August, 1904, whereby the defendant insisted that the negotiations looking to a compromise ended on the date of said letter of the 16th of August, and that the failure of the plaintiff to institute its action within 30 days from that date, said suit not having been commenced until the 10th day of October, 1904, barred a recovery, and the said defendant, on account thereof, craved judgment against the plaintiff. Upon the issues thus joined a jury was impaneled, and after the conclusion of all the evidence the court, on motion of the defendant, instructed a verdict in its favor, to which action of the court, as well as to sundry rulings made pending the trial, upon the admission and exclusion of evidence, exceptions were duly taken by the plaintiff, and this writ of error sued out to this court. A preliminary motion was submitted to this court involving the technical question of the sufficiency of the bill of exceptions certifying the evidence in the case, and that motion at a previous term of the court was in an oral opinion decided in favor of the defendant, the two circuit judges concurring therein, and the writer dissenting. The evidence, therefore, so far as contained in said bill of exceptions, is eliminated, and the case is now before the court solely upon the propriety of the rulings of the lower court upon the questions raised by the pleadings, and upon the admission and rejection of evidence pending the trial, and the entry of judgment for the defendant.

Randolph Harrison and A. R. Long, for plaintiff in error.

Robert H. Talley and J. T. Coleman (Cabell, Talley & Cabell and Caskie & Coleman, on the brief), for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and WADDILL, District Judge.

WADDILL, District Judge (after stating facts as above). Ten bills of exceptions were taken to the action of the lower court respecting the admission and exclusion of evidence, and one, the eleventh, to the direction by the court of a verdict for the defendant. The 10 bills of exception and assignments of error based thereon relate to the efforts on the part of the plaintiff to introduce certain correspondence between the plaintiff and certain of the representatives of the defendant company, or between agents and representatives of the respective companies, regarding the claim in suit, after the 16th of August, 1904, the day on which the defendant in its rejoinder to the special plea claims to have terminated the efforts at adjustment. The court in its rulings as set forth in bills of exception from 1 to 8, inclusive, as shown by the able and elaborate opinion of the learned judge of the court



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below (140 Fed. 718), was controlled largely by its view of the effect of the effort at compromise upon the fourteenth clause of the policy sued on; the court's view being that what had been done operated only to suspend the clause in question during the period of such efforts at adjustment, which, as averred by the defendant, terminated on the 16th day of August, 1904, and that suit should have been instituted on the policy within 30 days from that time, and that inasmuch as the correspondence and evidence sought to be introduced, as shown by said eight bills of exception, related to efforts at adjustment after the 16th day of August, such correspondence could not be introduced; it not appearing that those claiming to act for the company had authority to waive any of the conditions or provisions of the policy as shown by the sixteenth clause thereof. It is as to the first ruling of the court, and as a consequence of which its subsequent rulings were made, that we shall first pass. Section 14 of the policy of insurance is as follows:

"14. No action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue. No such action shall lie unless brought within the period within which a claimant might sue the assured for damages unless at the expiry of such period there is such an action pending against the assured, in which case an action may be brought against the company by the assured within thirty days after final judgment has been rendered and satisfied as above. The company does not prejudice by this clause any defenses to such action which it may be entitled to make under this policy."

The plaintiff in error satisfied the judgment against it on the 15th day of April, 1904, and under the strict terms of clause 14 suit should have been instituted thereon within 30 days from that time, but by reason of the correspondence of the parties this period was confessedly extended from the 15th of May, 1904, until the 16th day of August, 1904; and the effect of the decision of the lower court is that what occurred operated to suspend said clause to the 16th day of August, 1904, when it was again revived and became operative for a period of 30 days, thereby requiring suit to be instituted within 30 days from the 16th of August, 1904. In this view we are unable to concur, believing that the same is neither supported by reason or authority. Clause 14 was a limitation prescribed by the contracting parties in the interest of the insurer, and which should be construed most favorably for the insured. Holladay's Adm'r v. Phœnix Ins. Co., 7 U. S. App. 325, 51 Fed. 715, 2 C. C. A. 463; Cotten v. Fidelity & Casualty Co. (C. C.) 41 Fed. 506; 2 May on Insurance (3d Ed.) § 478; 2 Wood on Fire Insurance (2d Ed.) 120.

The insurer had the right to insist on the enforcement of this special limitation, but upon departing therefrom, certainly in the absence of express stipulation to the contrary, what was done operated, not as a suspension of the clause, but a waiver thereof, and after such waiver the general statute of limitations of the state, and not the special time named in the contract, governed the parties in the enforcement of the same. The reason for this is apparent, and this case is a striking illustration of what would be the ill effect of a contrary doctrine. No one would ever know when, as to such contracts, the statute of limitations

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began or ceased to run. It would not be determinable from an examination of the contract, nor from the state statute, but would depend upon an uncertain and indefinite state of facts, as to which persons might think differently, and bring about a chaotic condition, which would be exceedingly undesirable. The requirement to sue within 30 days is a stringent clause at best in contravention of the general law on the subject, and only enforcible because of the special agreement of the parties; and it is one that cannot and should not be revived by implication, if once lost; and, besides, the equities of the case would be unfavorable to the adoption of such a policy. The insurer knowing his rights under the general law could afford to waive the clause in question, in order to effect an adjustment, and the assured likewise to make or entertain such a proposition, realizing that by so doing he would forfeit nothing, and upon failure proceed by suit within the statutory period to enforce his claim. The contrary view would result in making practically impossible any effort at compromise between the parties, certainly so far as the assured is concerned. If it be suggested that the benefit of the clause, so far as securing speedy adjustment, would be lost, the answer is that at least a specific contract for revivor of the special limitation contemplated after the failure of the settlement should be had, if it is proposed to avoid the statutory limitation. This question would seem to be precluded, so far as this court is concerned, by the decisions of the Supreme Court of the United States; and certainly the decisions of two of the states of this circuit, namely, Maryland and West Virginia, are to the same effect. In Semmes v. Hartford Insurance Co., 13 Wall. 158, 20 L. Ed. 490, a 12 months' limitation in an insurance policy having expired, when it was impossible by reason of the war for the insurer to sue, the Supreme Court held that such limitation was avoided, and not merely suspended: and in an able and elaborate opinion Mr. Justice Miller distinguished between the effect of such clauses in contracts and the ordinary limitation prescribed by statute. He said:

"We are of opinion that the period of 12 months which the contract allowed the plaintiff for bringing his suit does not open and expand itself so as to receive within it three or four years of legal disability created by the war, and then close together at each end of that period, so as to complete itself, as though the war had never occurred. It is true that in regard to the limitation imposed by statute this court has held that the time may be so computed, but there the law imposes the limitation, and the law imposes the disability. It is nothing, therefore, but a necessary legal logic that the one period should be taken from the other. * * * Such is not the case as regards this contract. The defendant has made its own special and hard provision on that subject. * * * Now, this contract relates to the 12 months next succeeding the occurrence of the loss, and the court has no right, as in the case of a statute, to construe it into a number of days equal to 12 months, to be made up of the days in a period of five years in which the plaintiff could lawfully have commenced his suit. So, also, if the plaintiff shows any reason which in law rebuts the presumption, which, on the failure to sue within 12 months, is by the contract made conclusive against the validity of the claim, that presumption is not revived again by the contract. It would seem that when once rebutted fully nothing but a presumption of law, or presumption of fact, will again revive it. There is nothing in the contract which does it, and we know of no such presumption of law. Nor does the same evil consequence follow from removing absolutely the bar of the contract, that would from removing absolutely the bar of the statute; for, when the bar of the contract

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is removed, there still remains the bar of the statute, and, though the plaintiff may show by his disability to sue a sufficient answer to the twelve months provided by the contract, he must still bring his suit within the reasonable time fixed by the legislative authority; that is, by the statute of limitations."

In Thompson v. Phœnix Insurance Co., 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408, 298, Mr. Justice Harlan speaking for the court, in considering a provision of a character similar to the one under consideration said:

"While the validity of such a stipulation cannot be disputed (Riddlesbarger v. Hartford Ins. Co., 7 Wall. 386, 389, 19 L. Ed. 257), we do not doubt that it may be waived by the company, and such waiver need not be in writing. It may arise from such a course of conduct on its part as will equitably estop it from pleading the prescribed limitation in bar of the suit by the insured."

In the same case, on page 299 of 7 Wall. (19 L. Ed. 257), the learned justice further said (citing from Mickey v. Insurance Co., 35 Iowa, 174, 180, 14 Am. Rep. 494):

"It would be contrary to justice for an insurance company to hold out the hope of an amicable adjustment of the loss, and thus delay the action of the insured, and then be permitted to plead this very delay, caused by its course of conduct, as a defense to the action when brought."

In Hartford Insurance Co. v. Unsell, 144 U. S. 439, 448, 12 Sup. Ct. 671, 36 L. Ed. 496, the Supreme Court of the United States considered the effect of a waiver of the provisions of a contract of the kind, and what constituted such waiver, and the forfeitures thereof, and quoting from the opinion of Mr. Justice Bradley, in Insurance Co. v. Norton, 96 U. S. 234, 24 L. Ed. 689, said:

"We have recently in the case of Insurance Co. v. Norton, 96 U. S. 234, 24 L. Ed. 689, shown that forfeitures are not favored in the law; and the courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or any agreement to do so on which the party has relied and acted. Any agreement, declaration, or course of action on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture."

And in the further progress of the opinion, on page 450 of 144 U. S. page 674 of 12 Sup. Ct. (36 L. Ed. 496), the court said:

"It is always open for the insured to show a waiver of the condition or a course of conduct on the part of the insurer which gave him just and reasonable ground to infer that a forfeiture would not be exacted. But it must be a just and reasonable ground, one on which the insured has a right to rely."

The case of Semmes v. Insurance Co., supra, was followed by the Court of Appeals of Maryland in Earnshaw v. Sun Mutual Aid Society, 68 Md. 465, 475, 12 Atl. 884, 6 Am. St. Rep. 460, and by the Supreme Court of Appeals of West Virginia, in Galloway v. Standard Fire Ins. Co. (W. Va.) 31 S. E. 969, 971. To the same effect is Insurance Co. v. Baker, 153 Ill. 240, 38 N. E. 627; Eliot Nat. Bank v. Beale, 141 Mass. 566, 570, 6 N. E. 742; Jackson v. Fidelity &

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Casualty Co. of N. Y., 41 U. S. App. 552, 562, 75 Fed. 365, 21 C. C. A. 394.

A further citation of authority is not deemed necessary, as we feel not only bound by those given, but are convinced of the soundness of the rule adopted, as well as the justice of the conclusions that flow therefrom. Many of the authorities upon each side of the question will be found in the interesting discussion of the subject in the lower court's opinion, to which we refer (140 Fed. 718, supra).

The rulings of the court as set forth in the bills of exception Nos. 1 to 8, inclusive, may doubtless have been correct under the court's view of the suspension, as distinguished from the waiver of clause 14 of the policy, as the parties to the correspondence on behalf of the defendant in error may not have had authority to waive any of the provisions of the policy, including the extension of the time under which suit might be instituted; but if the suspension was not a practical question, the clause having been previously waived by the course of conduct of the defendant company respecting the same, then manifestly the letters sought to be introduced should have been admitted as a part of and along with the other correspondence between the parties, or their agents, as to the adjustment of the claim. The rejected letters consisted of certain correspondence between the plaintiff and the local and state agents of the defendant, and between said agents themselves, regarding the adjustment of the claim in suit and which was a mere continuation of the same adjustment admitted to have been under consideration for 90 days, after the 30-day limitation under which suit might be brought had expired. These letters, together with the explanation of the circumstances under which and why they were written, should have gone to the jury along with the other communications had between the parties upon the issues joined, and it cannot be said that the plaintiff may not have been prejudiced because of such failure. Boston & Albany R. R. Co. v. O'Rielly, 158 U. S. 334, 337, 15 Sup. Ct. 830, 39 L. Ed. 1006, and cases cited; Resurrection Gold Mining Co. v. Fortune Gold Mining Co., 64 C. C. A. 180, 189, 129 Fed. 668.

The objections to the rulings of the trial court, as shown by bills of exception 9 and 10, appear not to be well taken, and certainly in a subsequent trial the questions therein raised will become immaterial.

It follows from what has been said that the action of the lower court should be reversed, with costs, and the case remanded thereto, with directions to award a new trial, the same to be had in accordance with the views herein expressed.

Reversed.

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(149 Fed. 900.)

## LINSTROTH WAGON CO. v. BALLEW. *

(Circuit Court of Appeals, Fifth Circuit. January 9, 1907.)

No. 1,572.

BANKRUPTCY—ACTION PENDING IN STATE COURT—JUDGMENT—CONCLUSIVENESS.

Before the filing of an involuntary petition, claimant instituted suit in a state court to recover specific personal property alleged to have been purchased by the bankrupt by fraudulent representations, and obtained a writ of sequestration under which the property was seized. Bankruptcy proceedings were then instituted, and the trustee, by leave of the state court, intervened and unsuccessfully defended the suit, in which claimant recovered judgment for the return of the property. *Held*, that the state court's jurisdiction was not lost or in any way affected by the filing of the bankruptcy petition, or by the subsequent adjudication that the buyer was a bankrupt, and that, so far as the property or its proceeds were concerned, the judgment was conclusive on the trustee as a person acquiring an interest pendente lite, though he was not a necessary party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 319, 322.]

Appeal from the District Court of the United States for the Northern District of Texas.

On July 12, 1904, one W. M. Morgan, who resides and does business in Corsicana, Navarro county, Tex., made his application to the Linstroth Wagon Company, the appellant, at its place of business, in St. Louis, Mo., to buy a lot of its wagons on a credit of four, six, and eight months. Before accepting Morgan's orders, the appellant investigated his commercial standing, and ascertained, from his report and statement made to R. G. Dun & Co.'s Commercial Agency, that he claimed to have assets amounting to $62,604.33, with liabilities amounting to only $23,432.74, and showing that his assets included cash value of stock on hand of $27,980.15, cash value of stock in transit, $6,000; accounts and bills receivable considered good, $26,732, and real estate of the value of $4,000, over and above exemptions. His liabilities consisted of amounts due upon open accounts, $200.38; for merchandise closed by notes, $22,632.36; loans from bank, $600. Thereupon, and relying on the said statement so made by Morgan, his orders for 50 wagons on the terms proposed were accepted and the goods were shipped to him to Corsicana, Tex., and to Ennis, Tex. On August 10, 1904, he executed and delivered to appellant his notes for the specified payments. On or about October 27, 1904, the appellant received an invitation from Morgan to attend a creditors' meeting at Corsicana on the 8th of November, following. Appellant then began investigations, which satisfied it that the statements made by Morgan to R. G. Dun's Commercial Agency were false, and fraudulently made for the purpose, and with the intention of establishing a false basis of credit, and were made with the fraudulent intent to deceive the commercial world generally, and the appellant in particular, and that Morgan, at the time said statements were made, was insolvent and his liabilities largely exceeded his assets. As soon as appellant discovered the fraud perpetrated upon it, it elected to rescind the contract of sale, and on November 7, 1904, brought suit in the proper state court against Morgan, and obtained writs of sequestration for the seizure of the goods to be held subject to the order of the court, and prayed judgment for the wagons, for costs and for general relief. One of these writs of sequestration was executed immediately by seizing the wagons found in Navarro county. Two days after the bringing of the suit by the appellant in the state court, as just recited, certain creditors of Morgan presented an involuntary petition in bankruptcy against him in the bankruptcy court for the district which embraced Morgan's residence, and on the following day, to wit, November 10th, made an application

* Rehearing denied February 19, 1907.

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to the referee for the appointment of a receiver to take possession of the property belonging to the bankrupt's estate until a trustee could be appointed and had qualified. Such receiver was immediately appointed, and took possession of the bankrupt's estate, including the goods claimed in the appellant's suit and on some of which the writ of sequestration to the sheriff of Navarro county had been levied. On December 13th the receiver returned an inventory of all the property belonging to the bankrupt estate, as far as the same had then come to his knowledge, including therein the goods claimed by the appellant, and on January 4, 1905, the receiver applied for an order to sell all of the property free from incumbrances, of which application notice was duly given to all the known creditors and parties in interest to show cause, if any there be, why the sale should not be made. On December 31, 1904, W. M. Morgan & Bro. were duly adjudicated bankrupts. Pending the giving of the notice of the application for sale, the first creditors' meeting was held on January 23, 1905, at which meeting the appellee, who resided in Corsicana, Tex., was appointed trustee, and on the same day was, as such trustee, ordered to sell all of the property which had been so inventoried by the receiver. On February 11, 1905, the appellant, on leave, amended its petition in the state court, by showing to the court what had been done under the sequestration writs and adding the following averment: "Plaintiff is informed and believes and here charges that subsequent to the levy and seizure of the wagons by the sheriff of this county (Navarro) and subsequent to the time when the writ to Ellis county should have been levied, certain of the creditors of defendant W. M. Morgan filed a petition in the United States District Court at Dallas, Tex., to have him adjudged a bankrupt, and that thereafter said Morgan was adjudged a bankrupt by said court, and the defendant, Ballew, has been appointed trustee for his estate, and is now as such trustee in the possession of all of said wagons here sued for, claiming same as a part of the said Morgan's estate. Plaintiff now aks that said Ballew, trustee in bankruptcy, be made a party hereto, and that on trial it have judgment for its said wagons against both Morgan and Ballew. It further prays for costs and general relief." On this amended petition there is indorsed: "I hereby accept service of the above petition, waive issuance of citation and enter my appearance at March term, February 11, 1905. [Signed] W. W. Ballew, Trustee of W. M. Morgan."

The trustee presented a plea in abatement to the jurisdiction of the state court, in which he set up, in substance: "That the suit of the Linstroth Wagon Company was instituted against W. M. Morgan within less than four months prior to the bankrupt proceedings instituted against W. M. Morgan by Jos. W. Moon Buggy Company et al., in the United States District Court for the Northern District of Texas; that at the time of the filing of this suit against W. M. Morgan by plaintiff herein, the said Morgan was in possession of the goods sued for, under valid contract and purchase, and that the title to said goods had passed to Morgan long prior to the filing of the suit herein, and that when Morgan was adjudicated a bankrupt the title to said goods vested in said W. W. Ballew, immediately upon his election as trustee, and that no action in this court can defeat the jurisdiction of the bankruptcy court in the administration of all the assets that were in the possession of Morgan at the time of the filing of the petition in bankruptcy, and for four months prior thereto; that this suit was instituted only a few days before bankrupt proceedings were filed, and that the right of the bankruptcy court over the property is not only superior to that of the state court, but is exclusive, regardless of any action taken in the state court whose jurisdiction in such cases is divested by the bankruptcy proceedings, and this court has no right to further proceed herein." The same matter substantially was presented in exceptions to the plaintiff's petition, and not waiving the plea to the jurisdiction or the exceptions to the petition, the trustee answered with a general denial, and plead specially that the appellant had not relied upon the report made by Morgan to Dun's Mercantile Agency, but was specifically notified that the agency did not accept that report as correct, and had informed the plaintiff that the property statement of Morgan in his report to that agency was greatly exaggerated and that as a matter of fact he was, in all probability, insolvent, and that thus,

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with full and timely notice of the insolvency of Morgan, the plaintiff made an absolute sale of the goods to Morgan and accepted his notes therefor without making further inquiry. He plead further that if it should be held that the plaintiff is entitled to recover the goods by reason of the avowed false and fraudulent statements, the goods have in fact been in the possession of Morgan and the trustee for more than six months under claim of title and the goods have been stored in the warehouse of Morgan, and he and the trustee have been compelled to pay rent upon the warehouse and insurance upon the goods, and that plaintiff is liable for the storage of the goods and for the freight paid from St. Louis to Corsicana and Ennis, and for insurance upon the goods; that the freight, storage, and insurance are reasonably worth $1,200, which is a lien upon the property which the trustee is entitled to have foreclosed and the property sold to satisfy the same, concluding with appropriate prayers.

On April 25, 1905, the case in the state court came on for trial. Plaintiff appeared by its attorney, Morgan made default, W. W. Ballew, trustee, appeared in person, and both the parties present announced ready for trial. A jury was waived, and all questions of fact, as well as of law, were submitted to the court, which, having heard the pleadings read, and the evidence adduced, and the argument of counsel, was of the opinion that the property sued for, to wit, 50 complete Linstroth wagons, were obtained from the plaintiff by W. M. Morgan through false representations, and that therefore plaintiff is entitled to recover the same, and entered judgment accordingly. The decree further recites that it appeared to the court that on the 7th of November a writ of sequestration was issued in the cause at the instance of the plaintiff, and went into the hands of the sheriff of Navarro county, by virtue of which he seized and took into his possession certain wagons situated in Navarro county, Tex., described as follows (giving particular description), which wagons were afterwards delivered by the sheriff to L. Carpenter, the receiver appointed by the referee, and that the sheriff took the receiver's receipt for the same, and that the defendant, Ballew, trustee, as such trustee, is in the possession of, and claiming certain of the foregoing described wagons, including those delivered by the sheriff to the receiver as belonging to the bankrupt estate, described and valued as follows (giving a minute description with value), and announcing that it was the finding of the court that plaintiff is entitled to judgment against said Ballew as trustee for the said wagons in his possession as such trustee, gave and caused to be entered the appropriate judgment. Thereafter, on June 28, 1905, the appellant filed its application before the referee, claiming title to the property which had been adjudged to it against W. M. Morgan and against the trustee by the said court, which application the referee set down to be heard on the 12th day of July, 1905, and issued a rule requiring the trustee to show cause on that day why the property should not be delivered by him to the appellant. On the day named the trustee filed his answer to the application, in which he set up substantially the same matters he had urged by his plea, exceptions, and answer in the state court. To this answer of the trustee the appellant replied by exceptions that the matters stated were not responsive to the issue presented by the plaintiff, are evasive and show no cause of defense against the cause of action asserted by Linstroth Wagon Comapny; that so much of the answer as sets up that the sale to W. M. Morgan had passed to him the title to the wagons, presents an issue that had theretofore been adjudicated by the district court of Navarro county, Tex., a court of competent jurisdiction with all parties here interested before it. It also denies the allegation in the trustee's answer that it appeared in open court and refused to claim the property in controversy, but says it had no notice of any order of sale being issued; that it has never been a party to any proceeding in this court, and does not now and never has occupied the position of a creditor of the bankrupt, but shows to the court that, prior to any bankruptcy proceedings against Morgan, its status as against him had been fixed by the suit begun in the district court of Navarro county, Tex., in which the title to the property in controversy was claimed by it, and in which suit the question of whether or not the title to the goods in controversy passed to the bankrupt was adjudicated and decided adversely to the

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bankrupt and to the trustee. It denies that any judgment by the District Court of the United States has ever been made, enjoining it from asserting title to the goods in controversy, or enjoining the judgment obtained by it in the district court of Navarro county, Tex.; that by the order of that court, the plaintiff was directed to present its application to this court for the delivery to it of said goods.

In support of the application, and of the trustee's answer thereto, respectively, the record of the proceedings in the state court and in the bankruptcy court were submitted, and on the same day the referee made his order, dismissing the application for the possession of the property, providing in the order that "nothing herein shall be construed as preventing claimant from prosecuting any remedy which he may have against the fund produced by the sale of said property in this proceeding." To which action and judgment of the referee the appellant excepted, and duly filed its petition, asking to have the same reviewed by the judge of the court, stating the grounds of its exception and objection to the order, and of its claim for the relief asked, which need not be recited here. The claim of the appellant on certificate from the referee came on to be heard before the district judge on February 26, 1906, when the trustee stated in open court that the property applied for had been sold since the order of the referee, dismissing the application, and the petition for review thereof on certificate had been filed. Thereupon, the court made the order from which this appeal is taken. The order is as follows:

"It being made to appear to the court that the property in the hands of the trustee of the bankruptcy estate, which the claimant Linstroth Wagon Company claimed, and by its application to the referee sought to recover, has been sold in the due course of the administration of the bankruptcy estate, and that the proceeds of said sale are in the hands of the trustee of said estate, it is ordered that the certificate herein be returned to the referee for the purpose of incorporating these acts therein. It is further ordered that the claimant be, and it is, hereby permitted to present its claim before the referee in bankruptcy for the funds arising from the sale of the said property. It further appearing to the court that the issue raised by claimant in the certificate of the referee has been settled by the sale of the property, it is ordered that the certificate of the referee upon coming in with the additions made thereto, as above provided, stand dismissed, with costs against the Linstroth Wagon Company. To which action of the court the Linstroth Wagon Company excepts in open court, and gives notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit. Upon the announcement by the court of its decisions on the certificate of the referee, the Linstroth Wagon Company presented in open court, and asked leave to file what it termed "an amended petition of complaint," which paper had to do with its claim for the value of the wagons sold by the referee as such value was fixed in a judgment of the district court of Navarro county, Tex. The court denied leave to file said amended petition of complaint, and directed that whatever papers the Linstroth Wagon Company desired to file in connection with such claim be filed before the referee in bankruptcy for his action thereon. To which refusal and action of the court the Linstroth Wagon Company excepted, and gave notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit."

H. L. Stone, for appellant.

J. E. Cockrell, Edward Gray, and W. W. Ballew, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The features of this case call to mind the opinion which seems to have been quite prevalent in many quarters at one time while the bankrupt act of 1867 was in force, that the moment a man is declared bankrupt, the District Court, which has so adjudged, draws to itself, by that

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act, not only all control of the bankrupt's property and credits, but that no one can litigate with the trustee contested rights in any other court except in so far as the Circuit Courts had concurrent jurisdiction, and that other courts could proceed no further in suits of which they had, at that time, full cognizance; as the result of which opinion the practice became prevalent to bring any person who contested with the trustee any matter growing out of disputed rights of property or contracts, into the bankruptcy court by service of the rule to show cause, and dispose of their rights in a summary way. Against this view of the matter and practice which for a time sweepingly prevailed, the Supreme Court steadily set its face. Eyster v. Gaff et al., 91 U. S. 525, 23 L. Ed. 403. On the going into effect of the present act, some of the referees in bankruptcy and of the judges of those courts, unmindful of the teaching of the Supreme Court under the act of 1867, or disregarding its lesson, began to follow the practice which had prevailed under that act against which the Supreme Court had steadily set its face. With the usual tendency toward the growing weight of precedents, that practice had extended and become widely prevalent before the case of Bardes v. Hawarden Bank (U. S.) 20 Sup. Ct. 1000, 44 L. Ed. 1175, distinctly presented for the decision of the Supreme Court the question as to whether under the act of 1898 a District Court of the United States, in which proceedings in bankruptcy had been commenced and are pending under the act, has jurisdiction to entertain a suit by a trustee in bankruptcy against a person holding and claiming as his own, property alleged to have been conveyed to him by the bankrupt in fraud of creditors. It was considered that the determination of this question depends mainly upon the true construction of section 2 and section 23 of the present act (Act July 1, 1898, c. 541, 30 Stat. 545, 546, 552, 553 [U. S. Comp. St. 1901, pp. 3420, 3431]), which sections are embodied, in hæc verba, in the opinion of the court, and the question of their effect, considering the language of each and their relations to one another, was approached by referring to the terms, and to the judicial construction of the bankrupt act of 1867, and comparing its provisions as to the jurisdiction of proceedings in bankruptcy, and as to the original jurisdiction of actions at law and suits in equity with the provisions of the present act; and after a full review and discussion of previous decisions and provisions of the act under which they were made, and of the analogous provisions of the present act, it was held that the provisions of section 23b control and limit the jurisdiction of all courts over suits brought by trustees to recover property from third parties, or to set aside transfers of property to third parties alleged to have been fraudulently made as against creditors, and that the District Court of the United States can, by the proposed defendant's consent, but not otherwise, entertain jurisdiction over such suits.

On the same day, and through the same justice as its organ, the Supreme Court announced its decision in White v. Schloerb (U. S.) 20 Sup. Ct. 1007, 44 L. Ed. 1183. That case, therefore, can hardly be considered or read so as to qualify the opinion in Bardes v. Bank. In entire consistency with all the reasoning in the opinion in the Bardes Case, the White Case held that, after an adjudication in bankruptcy,

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an action of replevin in a state court cannot be commenced and maintained against the trustee for property in the possession of and claimed by the bankrupt at the time of the adjudication, and in the possession of the trustee in bankruptcy at the time the action of replevin is begun, and that the District Court sitting in bankruptcy has jurisdiction by summary proceedings to compel the return of property so seized. This decision rests on principles that are elementary.

A year later the Supreme Court, speaking through the same distinguished justice, who announced the decisions in the cases just cited, announced its decision in Bryan v. Bernheimer, 181 U. S. 197, 21 Sup. Ct. 557, 45 L. Ed. 814, reciting that the property involved in that controversy was not held by Davidson (private assignee of the bankrupt) under any claim of right in himself, but under a general assignment, which was itself an act of bankruptcy; that no trustee had been appointed; that the sale by Davidson to Bernheimer was made after and with knowledge of the petition in bankruptcy; that Bernheimer consented to the form of proceeding, and that therefore the District Court, as a court of bankruptcy, was authorized to decide the matter in a summary way; which, in effect, means that Bernheimer was not an adverse claimant, and that he had expressly submitted his claim to the court in that proceeding.

In the case of Mueller v. Nugent, the claimant held the money in controversy as the agent of his father, the bankrupt, and without any claim of adverse interest in himself; and though he had not, like Bernheimer, submitted himself to the jurisdiction of the bankruptcy court, he was held to be amenable to the control of that court by summary proceedings. 184 U. S. pp. 17, 18, 22 Sup. Ct. 269, 46 L. Ed. 405. In the course of the opinion in this case, the remark was made that the filing of the petition is a caveat to all the world and in effect an attachment and injunction. In reference to which remark, the Supreme Court afterwards said that it was made in regard to the particular facts in the case in which it was used. York Manufacturing Co. v. Cassell, 201 U. S. 353, 26 Sup. Ct. 481, 50 L. Ed. 782. It was also said in the Bernheimer Case that the remark made in the Bardes Case, that the powers conferred on courts of bankruptcy by clause 3 of section 2, and by section 69 (30 Stat. 545, 565 [U. S. Comp. St. 1901, pp. 3421, 3450]), after the filing of the petition in bankruptcy, can hardly be considered as authorizing the forcible seizure of such property in the possession of an adverse claimant, was an inadvertence, and upon a question not arising in the case then before the court which related exclusively to the jurisdiction of the suit by the trustee after his appointment. The Supreme Court has never held itself bound by any part of an opinion in any case which was not needful to the ascertainment of the right or title in question between the parties.

Mr. Chief Justice Marshall said, in Cohens v. Virginia, 6 Wheat. 399, 5 L. Ed. 257:

"It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented. The reason of this maxim is obvious. The question actually before the court

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**is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."**

And, in Carroll v. Lessee of Carroll et al., 16 How. 287, 14 L. Ed. 936, Mr. Justice Curtis referred to Ex parte Christy, 3 How. 292, 11 L. Ed. 603, and Peck v. Jenness et al., 7 How. 612, 12 L. Ed. 841, as illustrations of the rule that:

**"Any opinion given here or elsewhere cannot be relied on as a binding authority, unless the case called for its expression. Its weight of reason must depend on what it contains."**

The trustee takes the property of the bankrupt in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or incumbrance of the property, which is void as against the trustee by some positive provision of the statute. Thompson v. Fairbanks, 196 U. S. 526, 25 Sup. Ct. 306, 49 L. Ed. 577. The District Court has power to ascertain in a particular case presented whether the claim asserted is an adverse claim, within the meaning of the provisions of the bankruptcy law, existing at the time the petition was filed, and in accordance to the conclusion reached, that court will retain jurisdiction or decline to adjudicate the merits. In many cases the jurisdiction may depend upon the ascertainment of facts involving the merits, and in that sense the court exercises jurisdiction in disposing of the preliminary inquiry, although the result may be that it will find it cannot go further. And in a case where the court erroneously retains jurisdiction to ascertain the merits, its action can be corrected on review. Louisville Trust Co. v. Comingor, 184 U. S. 26, 22 Sup. Ct. 293, 46 L. Ed. 413; Mueller v. Nugent, 184 U. S. 15, 22 Sup. Ct. 269, 46 L. Ed. 405.

The numerous reported cases decided by the Supreme Court, beginning with Bardes v. Bank, and including Manufacturing Co. v. Cassell, supra, illustrate the application to particular cases of the sound construction placed upon the provisions of section 23, in Bardes v. Bank, and aid in the inquiry as to whether a given claimant is, in truth, an adverse claimant within the meaning of the provisions of that section, but did not, and do not, qualify the construction put upon those provisions in that case. The amendatory act of 1903 gave concurrent jurisdiction to the courts of bankruptcy and any state court which would have had jurisdiction if bankruptcy had not intervened, of suits by a trustee for the purpose of such recoveries as are authorized by section 60, subd. b, and section 67, subd. e (30 Stat. 562, 564 [U. S. Comp. St. 1901, pp. 3445, 3449]), in addition to those which could be entertained by the consent of the proposed defendant. These amendments do not touch the case of the appellant. It does not claim the property here in controversy under any transfer from the bankrupt; it expressly disclaims being a creditor of the bankrupt at the time of the institution of this suit. The suit is not founded upon a claim from which a discharge in bankruptcy would be a release, and therefore is not

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subject to the provisions of section 11a (30 Stat. 549 [U. S. Comp. St. 1901, p. 3426]). Before the filing of the involuntary petition, which imparted life to the jurisdiction of the court of bankruptcy as to Morgan and his estate, the appellant asserted its title to the specific personal property, clearly marked, branded, and distinctly pointed out, which it sought to recover against the bankrupt, then in possession of it, and obtained appropriate preliminary process for placing the property in safe custody pending the trial of appellant's title thereto. It did not seek to acquire or fix a lien by the levy of its writs of sequestration, or by the recovery of a judgment, but to establish its rights to the specific property and recover, lawfully, the possession of it. The appellant could not have sued in the Circuit Court, because the value of the property was less than $2,000; it could not sue in the United States District Court, because that court had no jurisdiction in civil cases, apart from its jurisdiction as a court of bankruptcy, and its jurisdiction as a court of bankruptcy had then not yet been vitalized by the filing of the involuntary petition. Therefore, it could invoke the jurisdiction of the proper state court only, which it did, and by its petition and the suing out of the writs for which it prayed, that court obtained jurisdiction of the cause, and the jurisdiction was not lost, or in any way affected by the subsequent filing of the involuntary petition against Morgan, or by the subsequent adjudication that he was a bankrupt. The trustee might have obtained leave of the court of bankruptcy to appear and defend the suit, and have so appeared by leave of the state court; but he was not a necessary party, and whether he did so appear or not the suit could proceed to final judgment which would be binding on the trustee equally with any other party acquiring an interest pendente lite. Therefore, so far as the property itself or the admitted proceeds of that property are concerned, it is immaterial whether we consider that the trustee became or not, legally, a party to the litigation in the state court. It is conceded that he did personally appear and plead, and that the issue as to the title was not only directly involved as against the bankrupt who made default, but was ably contested by the trustee by demurrer, plea, and answer. The physical facts appear to have been undisputed. The conclusions of law and fact deducible therefrom were directly and fully considered, and the appellant's ownership of the property adjudged.

It follows that the District Court erred in retaining possession of the appellant's property and proceeding to dispose of the same; and that it also erred in dismissing the appellant's application to review and correct the erroneous proceedings had before and by the referee, which were duly brought to the attention of the court by the proper certificate; that, in the condition things were at the time the certificate came on to be heard before the District Court, it should have ordered that the proceeds of the sale of the property in the custody of the court should be surrendered to the appellant, and without any costs against it or any deduction from the amount of the proceeds to meet the expenses and charges which were claimed by the trustee, or by any of the officers of the court of bankruptcy or the parties to the proceedings in that court as a lien against that fund. In support of

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this conclusion, and without further present argument, we refer to the opinion of this court in Beach et al. v. Macon Grocery Co. et al., 125 Fed. 513, 60 C. C. A. 557.

The action of the District Court sought to be reviewed on this appeal is wholly reversed, and the cause is remanded to that court, with directions to take order therein in accordance with the conclusions above expressed.

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(149 Fed. 968.)

## ASHBURN v. GRAVES et al.

## GRAVES et al. v. CRAWFORD et al.

(Circuit Court of Appeals, Fifth Circuit. January 22, 1907. On Rehearing, February 26, 1907.)

Nos. 1,506, 1,525.

1. QUIETING TITLE—RIGHT OF ACTION—POSSESSION.

In the absence of any local statute affecting the question, a suit in equity to remove a cloud upon the title to real estate cannot be maintained in a federal court by a complainant out of possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, §§ 8–11, 44, 45.]

2. SAME—CLOUD ON TITLE—DEED VOID ON ITS FACE.

A deed executed by a stranger to the title, or which for other reasons is void on its face, to convey title creates no such cloud upon the title as confers jurisdiction on a court of equity of a suit for its cancellation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, § 20.]

3. INJUNCTION—TRESPASS—PLEADING.

A bill to enjoin trespass by the cutting of trees does not state a case within the jurisdiction of equity, where it shows that the trees are forest trees, valuable only for lumber, and there is no allegation that the defendant is insolvent; and a mere allegation that complainant will suffer irreparable injury, without stating facts to support it, is not sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 232, 236.]

Appeal and Cross-Appeal from the Circuit Court of the United States for the Southern District of Georgia.

This is a suit in equity by Jennie L. Graves, Minnie C. Graves, and Ida Graves, citizens of New York, against H. T. Crawford, William McMullin, John McMullin, W. W. Ashburn, and John W. Hightower, citizens of Georgia. The property involved in the suit is real estate situated in the Eighth district of Colquitt county, Ga., described as lots numbered 353, 354, 383, and 384, containing 1,960 acres, worth $10,000.

The bill shows that Eli Graves acquired the title from the state of Georgia; that he conveyed it to Joel S. Graves March 22, 1848; that on June 8, 1855, Joel S. Graves conveyed the lands to Cyrus S. Graves, who died in 1863; and that the title passed by operation of law to the complainants, two of whom are the children, and one the widow, of Cyrus S. Graves. The complainants claim to have inherited title to the lands from Cyrus S. Graves. The lands are alleged to be valuable on account of the heavy growth of pine timber thereon.

The following is a condensed statement of the material averments of the bill on which the complainants based their right to relief: Complainants in the year 1889 consulted A. T. McIntyre, Sr., of the firm of McIntyre & McIntyre, attorneys at law, as to the protection of the lands from trespassers. McIntyre, Sr., advised complainants to obtain the services of William Mc-

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Mullin to protect the lands from trespassers. Complainants visited and examined the lands, and engaged William McMullin "to look after the lands." He promised to perform this service without charge on account of the past kindness of one of the complainants to his brother. The complainant Jennie L. Graves about April 2, 1899, conveyed all of her interest in the lands to the other two complainants. McIntyre, Sr., was retained to look after complainants' interest in the land, and to pay the taxes, and funds were left with him for that purpose. Complainants left with McIntyre, Sr., such "title deeds as they had." Complainants then returned to New York. McIntyre, Sr., prosecuted a suit against one Norman, who was a trespasser on part of the lands, and was paid a fee for his services. The complainants paid the taxes on the lands to the date of the filing of the bill.

The only part of the bill which connects W. W. Ashburn with the case is section 16, which is as follows: "Your orators further aver and charge that while the said A. T. McIntyre so represented your orators as attorney, as aforesaid, and was in possession of your orator's title deeds, as aforesaid, to wit, on November 5, 1890, the said McIntyre, as a member of the firm of McIntyre & Watson, undertook to convey by deed, and in behalf of said firm of McIntyre & Watson, to said W. W. Ashburn, the title to the north half of the lot No. 353, which deed is recorded on the records of the clerk of the superior court of Colquitt county, Ga., February 1, 1890. The said W. W. Ashburn accepted said conveyance with full notice that the title to said lot of land was in your orators, and that the said McIntyre & Watson had no title thereto. And your orators further aver and charge that the said deed constitutes a cloud upon the title of your orators' said lands. And the said north half of said lot being still covered with a heavy growth of marketable pine timber, and being chiefly valuable by reason of the opportunity to sell said timber, the said cloud upon your orators' title prevents your orators from selling the said timber, to the great wrong and injury and loss of your orators; and your orators further aver and charge on information that the said W. W. Ashburn has leased the timber privileges on the said north half of said lot No. 353 to the said John W. Hightower, who is about to proceed, under the said W. W. Ashburn, to cut and convey away said timber, to the great wrong and injury of your orators, and through other persons acting under him has boxed the trees and taken the turpentine from other portions of said lot No. 353."

It is alleged that by fraud or mistake lot No. 383 was sold at a receiver's sale; that McIntyre, Jr., of the firm of McIntyre & McIntyre, who at the time were complainants' attorneys, in possession of their deeds, bought the lot for $5, saying that he bought for orators, but took deed in his own name. The lot was worth $2,500. The facts were concealed from the complainants. Afterwards McIntyre, Jr., died, and Hayes was appointed his administrator. By a fraudulent agreement—Hayes being ignorant of the fraud—Hayes, as administrator, conveyed lot No. 383 to John McMullin, son of William McMullin, and John McMullin conveyed it to H. T. Crawford. The order of sale was obtained by McIntyre, Sr., who wrote the conveyances. The bill then makes averments charging H. T. Crawford with trespassing on lot No. 383 in December, 1898; that he commenced "to box trees on said lot for turpentine purposes." It also charged that Crawford entered upon the "south halves of lots 353 and 354, and cut timber on parts of the same, and used the same for turpentine purposes, and is continuing his trespasses thereon, and, unless restrained by the orders and decrees of this court, will destroy the entire timber and turpentine values of said lots."

As to the injury the complainants will suffer, the following averment is made: "Your orators further aver and charge on information that said trespassers, knowing the fact that your orators were defenseless females residing in a distant state, have taken advantage of your orators' absence, and have advanced from one step to another in the wrongs and injuries upon your orators in and about said lands, and that they have combined and confederated in said wrongs with the attorneys and agents aforesaid left by your orators in that locality to look after your orators' interests there, and that, unless the trespassers aforesaid are restrained and enjoined by the orders and decrees of this court, your orators will suffer irreparable loss and injury."

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The bill contains elaborate allegations as to William McMullin bringing a suit against complainants in a court of law by attachment and obtaining judgment for a large sum, and making levy and threatening a sale of complainants' property; but, as the court below canceled this judgment, and McMullin has not appealed, there is no question before this court as to that part of the bill.

The bill concludes with a prayer for an injunction against all the defendants to restrain them from boxing trees on any of the lands; that the fraudulent deeds and leases under which defendants hold be canceled, and for an accounting and decrees against defendants for the value of turpentine and timber used by them, respectively.

The defendants filed demurrers to the bill. The court overruled the demurrers. The defendants then filed answers. Evidence was taken, and the case was tried on its merits.

The court entered a final decree substantially as follows: That the bill as to H. T. Crawford be dismissed for want of equitable cognizance as shown by the proof, without prejudice to the right of the complainant to sue at law, the title to lot 883 and south half of lot 353 not being passed on; that complainants have a perfect legal title to lots 354, 384, and north half of 353, and are entitled to the relief prayed against all the other defendants; that the fraudulent judgment obtained by William McMullin be canceled; that a perpetual injunction be granted as to W. W. Ashburn and John W. Hightower and the Union Lumber Company, and all persons claiming under them, as to lots 354, 384, and north half of 353; that judgment is given complainants against W. W. Ashburn for $379.75 for the turpentine taken from the north half of lot 353 prior to the filing of the bill; that judgment is given complainants against W. W. Ashburn, and his lessees, Hightower and Union Lumber Company, for $1,076, for the value of timber cut from the north half of lot 353 pending the suit (and in violation of the injunction of the court); that the lease made by Ashburn to Hightower and the Union Lumber Company be canceled.

Ashburn appealed from this decree, and assigns that the court erred in overruling his demurrer to the bill, and in decreeing against him on the merits. None of the other defendants appeal. The complainants have sued out a cross-appeal. They assign that the court erred in dismissing the bill as to H. T. Crawford, and in failing to grant relief against Crawford.

Robt. L. Shipp, for appellant.

Marion Erwin, for appellees.

Marion Erwin and M. P. Callaway, for cross-appellants.

Robt. L. Shipp and Saml. B. Adams, for cross-appellees.

Before PARDEE and SHELBY, Circuit Judges, and MEEK, District Judge.

SHELBY, Circuit Judge, having made the foregoing statement of the case, delivered the opinion of the court.

Under rule 25 of this court the appeal and cross-appeal have been argued together as one case. Bucki v. Atlantic Lumber Company, 93 Fed. 765, 35 C. C. A. 590.

The appellant, Ashburn, assigns that the court below erred in overruling his demurrer. One of the grounds of demurrer was that there was no equity in the bill; that the complainants' remedy at law was ample and complete.

The only mention of Ashburn in the bill is in the sixteenth paragraph, which we have copied in full in the statement of the case. The averments, in brief, are that McIntyre, one of the complainants' attorneys, conveyed to Ashburn the north half of lot No. 353, which was owned in fee by the complainants, and that Ashburn accepted the deed and had it recorded; that Ashburn had

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leased to John W. Hightower the timber privileges on the north half of the lot; and that the lessee, under the lessor, is about to proceed to cut and convey away said timber, and through other persons has boxed the trees, and taken turpentine from trees on other portions of the lot. The contention is that these averments give the court jurisdiction in equity to remove a cloud on the complainants' title by canceling the deed that McIntyre made to Ashburn, and that these averments confer jurisdiction to enjoin the threatened trespass.

The jurisdiction of courts of equity to remove clouds from title is exercised for the reason that the deed, or other instrument constituting the cloud, may be used to injuriously or vexatiously embarrass the complainant's title. There are well-established limitations upon the exercise of the jurisdiction. A plaintiff having the legal title, and not in possession, will ordinarily be left to his action of ejectment. This is the familiar doctrine of the federal courts. United States v. Wilson, 118 U. S. 86, 89, 6 Sup. Ct. 991, 30 L. Ed. 110; McGuire v. Pensacola City Co., 105 Fed. 677, 44 C. C. A. 670. When a local statute gives the remedy by bill in equity to remove a cloud on the legal title, without requiring the complainant to first obtain possession, the remedy may be administered in appropriate cases by the federal courts. Southern Pine Co. v. Hall, 105 Fed. 84, 88, 44 C. C. A. 363. But we know of no such local statute affecting this case. What does the bill show as to the possession of lot No. 353? The appellee quotes authority to the effect that, if complainants allege that they are "seised in fee simple," that is a sufficient allegation of possession. Gage v. Kaufman, 133 U. S. 471, 10 Sup. Ct. 406, 33 L. Ed. 725. That is true, but we find no such allegation in the bill. The extent of the averment is that the complainants inherited the property from Cyrus S. Graves. So far from alleging possession by the complainants, the bill tends to show that Ashburn, by his lessee, is in possession. It is alleged that Ashburn accepted a deed to the property from McIntyre; that he "has leased the timber privileges" on it to Hightower, who is about to proceed to cut the timber and to carry it away, and through other persons acting under him has boxed the trees, and has taken the turpentine from trees on other portions of the lot. These averments certainly do not show that the complainants are in possession of the property, and we think that they are intended to show that Ashburn and his lessee are in the wrongful possession of it. For that reason the bill cannot be maintained as one to remove cloud from title.

If this difficulty were out of the way, do the averments of the bill show such apparent title in Ashburn as to constitute a cloud on complainants' title? The conveyance was made to Ashburn by McIntyre and one Watson. There are no allegations to show that either one of them had any apparent title to convey. They are strangers to the title set up by the complainants. If the complainants were in possession of the lot, and Ashburn sued for it, this deed to him, on the averments of the bill, would not enable him to recover. It would not make a prima facie case for him. No facts are alleged that, taken with the deed, would affect the title of the complainants, or interfere with their possession, if they were in possession. Ashburn's title, as shown by the bill, would fall of its own weight, and the complainants



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would never be troubled to offer any evidence. Such a deed, under the facts averred in the bill, is not a cloud on title. Thompson v. Etowah Iron Co., 91 Ga. 538, 17 S. E. 663; Pixley v. Huggins, 15 Cal. 127; Rea v. Longstreet, 54 Ala. 291. It is true that Mr. Pomeroy, while admitting that the weight of authority sustained it, objected to this doctrine, and expressed the opinion that equity should go so far as to cancel a deed void on its face (4 Pomeroy's Eq. Jur. [3d Ed.] § 1399), but the Supreme Court indorses the view that a void deed creates no such cloud as confers equity jurisdiction. Hannewinkle v. Georgetown, 82 U. S. 547, 21 L. Ed. 231; Rich v. Braxton, 158 U. S. 375, 15 Sup. Ct. 1006, 39 L. Ed. 1022.

The only other alleged ground of equity jurisdiction in the case as against Ashburn is to enjoin him from cutting the timber on the land. The bill shows that the trees are not shade trees in a yard, or on a lawn, or trees of any special value to ornament grounds. They are merely forest trees, the value of which may be easily estimated. There is no averment in the bill that Ashburn is insolvent. There is nothing in the bill to show that the remedy at law is not ample and complete. The bill, therefore, contains no equity as one to enjoin the cutting of the timber. West v. Walker, 3 N. J. Eq. 279, and notes; Cowles v. Shaw, 2 Iowa, 496; Paddock v. Davenport (N. C.) 12 S. E. 464; Jerome v. Ross, 7 Johns. Ch. (N. Y.) 314; 1 High on Injunctions (4th Ed.) §§ 676, 699.

In reference to trespasses by Crawford, it is alleged that, unless said trespasses "are restrained and enjoined by the orders and decrees of this court, your orators will suffer irreparable loss and injury." If this language be construed as applicable to Ashburn, it is immaterial. It is the mere conclusion or opinion of the pleader. Such facts must be stated as show the injury to be irreparable. This averment is not sufficient. Cruickshank v. Bidwell, 176 U. S. 75, 81, 20 Sup. Ct. 280, 44 L. Ed. 377.

The bill showed no grounds of equitable jurisdiction as a suit against Ashburn, and his demurrer should have been sustained, and the bill dismissed as to him without prejudice to the rights of the complainants to sue at law if they were so advised.

We are of opinion that the learned Circuit Court decided correctly in dismissing the bill as to Crawford, and that the cross-appellants are entitled to no relief by their appeal.

On the appeal of Ashburn, the decree against him is reversed, and the cause remanded, with instructions to sustain his demurrer and to dismiss the bill as to him. The costs of the appeal will be taxed against the appellees, and the costs of the cross-appeal against the cross-appellants.

PER CURIAM. The application for a rehearing is denied. See Southern Pine Company v. Hall, 105 Fed. 84, 44 C. C. A. 363, and cases there cited.

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(149 Fed. 973.)

KNUDSEN-FERGUSON FRUIT CO. v. CHICAGO, ST. P., M. & O. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. October 2, 1906.)

No. 1,237.

PAYMENT—RIGHT TO RECOVER—DEMAND PAID WITHOUT DURESS OR OBJECTION.

A consignee of a shipment of fruit, which, after the same was delivered to it and with full knowledge of the facts, paid without objection the charges of the carrier, including a charge for icing in transit, in addition to the published tariff rate for carriage, cannot thereafter maintain an action to recover back the amount of such icing charge, on the ground that it was illegally exacted.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Payment, §§ 254-261, 287.]

In Error to the Circuit Court of the United States for the Western District of Wisconsin.

To review the judgment of the Circuit Court in an action brought by plaintiff in error to recover $45, claimed to have been illegally exacted by defendant in error as a charge for icing service rendered in connection with the transportation of a car load of peaches, this writ was prosecuted. The Michigan Central, Chicago & Northwestern, and Chicago, St. Paul, Minneapolis & Omaha Railway Companies operate a continuous line from South Haven, Mich., to Duluth, Minn., the points of origin and destination, respectively, of the shipment in question. As required by the interstate commerce law, these three companies had filed tariff schedules exhibiting their charges for the transportation of fruits between the points mentioned. These schedules also stated that the published charges for transportation did not include the cost of icing in transit, but that the carrier would impose an additional charge for such service. When the peaches were turned over to the initial carrier, that company received from the consignor, Gill & Crary Fruit Company, a shipping order, as follows:

"Shipping Order Michigan Central Railroad Co.

"Sept. 7, 1903.

"Gill & Crary Fruit Co., Ltd.

"The Michigan Central Railroad Company will receive and carry the property marked, consigned and destined as indicated below to the said destination, if on its road, otherwise will deliver to another carrier on the route of said destination.

"It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained, both on the face and on the back hereof, and which are hereby agreed to by the shipper and by him accepted for himself and his assigns as just and reasonable.

| "Marks, Consignees and Destination. | Description of Articles. | Weight Subject to Correction. |
|---|---|---|
| "Knudsen-Ferguson Fruit Co. "Duluth, Minn. | 400 bushels peaches in baskets with wood taps. S. L. & C. Gtd. Icing $45.00. | 20000 lb. |
| "F. G. E. 16274 "Via C. & N. W. | Re-ice at Chgo and St. Paul. Gill & Crary Fruit Co., Ltd. Consignor." | |

The shipment reached Duluth and was delivered by defendant to plaintiff on September 12, 1903. On the 22d of September the defendant presented to plaintiff a freight bill, including the item of $138.44, which amount was made up of $93.44, the charge for transporting the peaches calculated at the

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**published rate for that service, and $45 icing charge. The plaintiff paid this bill on the day it was presented. In October of the following year the plaintiff instituted suit for the recovery of the $45 and attorney's fees. The complaint alleges that when the peaches reached Duluth, and while they were yet in the possession of the carrier, the defendant demanded that plaintiff pay the amount of the icing charge, and refused to deliver the shipment until such payment was made; that the charge was unlawful, and that plaintiff was obliged to pay the money to get the shipment released; in other words, that it was a case of duress of goods.**

Roger S. Powell, for plaintiff in error.

C. D. Severance, for defendant in error.

Before BAKER and SEAMAN, Circuit Judges, and LANDIS, District Judge.

LANDIS, District Judge, having stated the case as above, delivered the opinion of the court.

The plaintiff's theory of defendant's liability is that peaches, being of a perishable nature, cannot be transported in safety the distance between South Haven and Duluth (some 800 miles) without refrigeration in transit; that the law imposes upon the carrier the duty to carry safely; that therefore, when the carrier publishes a rate for the transportation of such perishable commodity, the obligation to refrigerate rests upon the carrier as an inherent essential to safe transportation, the performance of which obligation, as contended by plaintiff, gives the carrier no right to impose an additional charge therefor. This would be an interesting question, were it before us for examination; but in our view of the case, the plaintiff having paid the money with full knowledge of all the facts and after the goods had been turned over to it by the defendant company, we are precluded from a consideration of whether or not the carrier has a right to impose a charge for icing service in addition to the published rate for transportation.

The rule is that a party may not recover back the amount of an unlawful demand, when he has voluntarily paid the same with full knowledge of all the facts, unless the payment was made "to emancipate the person or property from an actual and existing duress imposed by the party to whom the money is paid." Brumagin v. Tillinghast, 18 Cal. 265, 79 Am. Dec. 176; Baltimore v. Lefferman, 4 Gill (Md.) 425, 45 Am. Dec. 145; Lamborn v. Commissioners, 97 U. S. 181, 24 L. Ed. 926. On the other hand, the action to recover back may be maintained "if the payment is caused, on the one part, by an illegal demand, and made, on the other, reluctantly and * * * without being able to regain possession of the property except by submitting to the payment." Maxwell v. Griswold, 10 How. (U. S.) 242, 13 L. Ed. 405.

In the pending cause, as seen above, the carrier's published tariff schedules notified the shipper that for furnishing ice in transit a charge in addition to the published freight rate would be made, and the shipping order of the consignor (who, for this purpose, was the agent of the plaintiff, consignee) specifically included the item for refrigeration by name and amount. The shipment was delivered to the plaintiff September 12th, and 10 days thereafter the defendant presented its bill, which, without even an expression of dissatisfaction, the plaintiff paid. Obviously, there was no duress of goods.

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The payment having been deliberately made with full knowledge of all the facts, and after the shipment came into the possession of the consignee, the legality of the icing charge is not before us for determination, and the judgment is affirmed.

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(149 Fed. 975.)

EUCLID NAT. BANK et al. v. UNION TRUST & DEPOSIT CO.

(Circuit Court of Appeals, Fourth Circuit. December 14, 1906.)

No. 664.

1. BANKRUPTCY—ORDERS—REVIEW—MODE.

Where an order was entered in bankruptcy, merely denying petitioner's right to participate in the individual assets of the bankrupt until the individual creditors had been first paid, and no order was entered either by the referee or District Court rejecting petitioner's claim, such order was reviewable on a petition for review, and not solely by appeal, under Bankr. Act July 1, 1898, c. 541, §§ 24, 25a, 30 Stat. 553 [U. S. Comp. St. 1901, pp. 3431, 3432].

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 915.]

2. SAME—PARTNERSHIP—INDIVIDUAL ASSETS—APPLICATION.

Where a member of an insolvent firm was adjudged a bankrupt, and the firm had no assets, firm creditors were not entitled to share in the individual assets of the bankrupt partner, which were insufficient to pay his individual debts, under Bankr. Act July 1, 1898, c. 541, § 5, subsecs. "f," "g," "h," 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424], providing that the net proceeds of the individual estate of each partner shall be applied to the payment of his individual debts, and that the surplus only shall be applied to pay partnership debts, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 563.]

Petition to Review, in Matter of Law, a Decision of the District Court of the United States for the Northern District of West Virginia, at Clarksburg.

See 142 Fed. 568.

C. D. Merrick, for appellants.

B. M. Ambler, for appellee.

Before GOFF and PRITCHARD, Circuit Judges, and WADDILL, District Judge.

WADDILL, District Judge. This is a petition to review, in matter of law, the action of the United States District Court for the Northern District of West Virginia, rendered on the 15th day of January, 1906, whereby said court adjudged and determined that the petitioners, creditors of the firm of Henderson, Barrett & Co., of which the bankrupt, H. C. Henderson, was a partner, were not entitled to share in the individual assets of the said H. C. Henderson, who had been adjudged a bankrupt, until his individual creditors had been first paid. The facts in the case are briefly these: H. C. Henderson was duly adjudged a bankrupt, and the Union Trust & Deposit Company was chosen as trustee of his estate in bankruptcy. Pending the bankruptcy proceedings, the petitioners for review here, creditors for a large amount of the firm of Henderson, Barrett & Co., in which the bankrupt was a partner, sought to prove their claims in Henderson's bankruptcy pro-

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ceeding; their contention being that, inasmuch as there were no assets of the firm, they had the right so to do. It was conceded that the individual assets of the bankrupt were not sufficient to pay his individual creditors in full; that the firm was insolvent; that there was no solvent partner thereof, and the firm as such, had not been adjudicated bankrupt. The referee denied the right of the partnership creditors to participate in the dividend arising from the estate of the bankrupt, H. C. Henderson, until his individual creditors had been fully paid. From this action of the referee, an appeal was duly taken to the District Court, and that court, taking the same view of the law, approved and confirmed his finding, and this petition for review of the District Court's action was applied for.

The question presented for our consideration is the correct interpretation of the provisions of Bankr. Act July 1, 1898, c. 541, § 5, subsecs. "f," "g," "h," 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424], respecting the distribution of the estates of bankrupts between individual and social creditors. A preliminary question is raised which it is necessary first to dispose of, namely, the appellees moved to dismiss the petition on the ground that the relief sought could only be secured by appeal pursuant to sections 24 and 25a of the bankrupt law, and not by a petition for review. It is true that the last-named section, paragraph 3, contemplates that appeals shall be taken in case of the allowance or rejection of a debt or claim in excess of $500, and that that is the appropriate remedy, and not a petition for review; but we think upon a careful perusal of the two sections in question it will be apparent that the action complained of was not such a rejection of the debt claimed as is contemplated in the act regarding appeals. Neither the referee nor the lower court rejected the debt of the petitioners, but denied to the holders of the debts the right of participation in the individual assets of the bankrupt until the individual creditors had been first paid. The petitioners would share to the full extent of their debts, in any distribution of the individual estate, after the extinguishment of the individual debts, had there been sufficient assets. The motion to dismiss should therefore be denied.

Coming to the merits of the case, clauses "f," "g," and "h" of section 5 of the bankrupt law are as follows:

"f. The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

"g. The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

"h. In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the parnership propery shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the

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partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt."

The language of subsection "f" would seem to be too clear to admit of serious doubt as to its meaning, namely, that the estate of the individual bankrupt should be first applied to individual debts, and those of the firm to the firm debts, and that only the surplus of the estate over and above what was necessary to pay the individual debts on the one hand, or the social creditors on the other, could be used and applied alike to the payment and adjustment of the individual and partnership debts, as the case may be. Indeed, the act plainly limits this latter application of the assets to the surplus thereof, as distinguished from the estate generally. The contention, however, is earnestly made that notwithstanding the clear and unambiguous provisions of the act, and the apparent justice thereof, a different rule should be adopted, and an exception made in cases where there is no partnership estate, and that in such a contingency the social creditors have a right to share along pari passu with the individual creditors, in the distribution of the latter estate. The question thus raised is not a new one, either under this or the former bankruptcy acts, and has given rise to much discussion in this country and in England, resulting in many conflicting decisions, and an apparently hopeless confusion of the subject. We are disinclined to enter into a general discussion of the various and irreconcilable opinions found in the reported cases. The decision of Judge Lowell in Re Wilcox (D. C.) 94 Fed. 84, contains an extended review of the entire subject, and especially a history of the law, to which we take the liberty of referring. The Circuit Court of Appeals of two of the circuits have taken antagonistic views of the present bankruptcy act. In Conrader v. Cohen, 121 Fed. 801, 58 C. C. A. 249, a decision of the Circuit Court of Appeals for the Third Circuit, the petitioners' right to share as partnership creditors in the individual assets of the bankrupt is fully recognized; and in Re Janes, 133 Fed. 912, 67 C. C. A. 216, a decision of the Circuit Court of Appeals for the Second Circuit, the contrary view is taken. A careful consideration of the entire subject and review of the authorities convinces this court that, whatever may have been the correct rule under former bankruptcy acts, the latter case, a decision of Judge Lacombe, of the Second circuit, concurred in by Judges Wallace and Townsend, presents the correct construction of the law under the present act; and, however much force there may have been in the contention made by petitioners under the former bankruptcy acts, or what may be the correct general doctrine applicable to the settlement and distribution of partnership estates, that it was clearly within the power of Congress to adopt a method for marshaling such assets, to be applied to the respective classes of creditors, which it has done, and in terms too clear and comprehensive to admit of the necessity for interpretation further than to adopt and follow its plain mandates. To ingraft upon this act the exception sought to be maintained by the petitioners would be manifestly improper on the part of the court, and in the language of Judge Lacombe in Re Janes, supra, would be judicial legislation. An able discussion on the subject will be found in the opinion of the

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lower court (128 Fed. 527), to which we refer, as also to In re Mills (D. C.) 95 Fed. 269, and In re Corcoran, 12 Am. Bankr. Rep. 283.

For the reasons given herein, the action of the lower court is in all respects approved, and the petition for review denied.

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(149 Fed. 978.)

## EVANS v. JOHNSON.

(Circuit Court of Appeals, Eighth Circuit. October 6, 1906.)

No. 2,243.

CORPORATIONS—ULTRA VIRES ACT—GUARANTY—ESTOPPEL.

H., being indebted to claimant on certain notes and desiring to form a corporation to take over his merchandise business, informed claimant of his intention. Claimant demanded that, if H. did so, the corporation should guaranty the paper. H. formed the corporation and sold the business to it, taking in return full paid capital stock, after which H., as president of the corporation, indorsed a guaranty on the notes to claimant on behalf of the corporation, after which H. acquired all of the corporation's stock. *Held*, that the corporation, never having received any benefit from its ultra vires act in guarantying such notes, was not estopped to deny the power to execute such guaranty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1554–1558.]

Appeal from the District Court of the United States for the District of Minnesota.

Appeal by the trustee in bankruptcy of the Hansen Mercantile Company from an order allowing the claim of Johnson. In February, 1901, Johnson sold to Hansen his interest in a mercantile business previously owned in partnership, and in part payment took Hansen's personal notes for $9,000. Hansen continued the business in his own name for nearly two years. He removed the goods to another town and reduced the principal of the notes to $7,500. In January, 1903, he caused the mercantile company to be incorporated under the laws of Minnesota with power as expressed in its charter to transact a mercantile business. He sold to the company his stock of merchandise then on hand for $20,000 of the capital stock of the company, fully paid. The merchandise was fairly worth the par value of the stock. About eight months afterwards, August, 1903, he executed to Johnson renewal notes for the balance of his indebtedness. These notes were dated back to February, 1903, and upon each thereof was a form of guaranty which Hansen as president executed in the name of his company. It is upon the guaranty of these notes that Johnson bases his claim. At the time Hansen did this there were outstanding in the hands of individual holders the following amounts of the capital stock of the company: $17,000 held by Hansen, $1,500 by his wife, $1,500 by clerks in the service of the company who purchased from Hansen for valuable considerations, and $5,000 by another party who bought direct from the company at full par value. When Hansen executed the renewal notes, he delivered his $17,000 of stock to Johnson as collateral, and the latter continued to hold it until the hearing before the referee. Hansen never obtained from the directors or stockholders of the company authority to obligate it for the payment of his personal debts nor was his action ever confirmed by them. No entry of the liability so attempted to be created appeared upon the books of the company, and no consideration for the guaranty moved to it. To establish a consideration and the elements of an estoppel Johnson testified that in November, 1902, about two months before the incorporation of the company, Hansen mentioned to him his purpose in that connection, and that he (Johnson) said that in such case Hansen would have to either pay or secure him: that he would not allow him to put his personal assets into a corporation

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while owing him $7,500 past due, but that, if he gave Hansen more time on the indebtedness, the latter would "have to guaranty the paper by the corporation soon after he got incorporated." Johnson testified that Hansen agreed to this, and we will consider the case according to his version, though there was a conflict in the evidence. In a legal and obligatory sense Johnson did not extend the time upon Hansen's indebtedness. The renewal notes were payable upon demand, and Johnson was at liberty to proceed upon them at any time after their execution. Four payments of interest upon these notes were made by the checks of the company. The first, for $600, was charged to Hansen's personal account upon the books of the company, and the other three, aggregating $600, were entered as expense items with nothing to indicate to whom they went. The company became bankrupt in July, 1904. The referee allowed the claim and the allowance was approved by the District Court.

W. A. Sperry (Lewis L. Wheelock, on the brief), for appellant.

Lafayette French and Henry A. Morgan (John F. D. Meighan, on the brief), for appellee.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The bankrupt corporation had no power under its charter to guarantee the obligations of others. Therefore to sustain his claim Johnson invokes the Minnesota doctrine of estoppel in connection with a contention that the company received a consideration for the guaranty of the notes. Willis v. Sanitation Co., 53 Minn. 370, 55 N. W. 550; Kraniger v. Building Society, 60 Minn. 94, 61 N. W. 904; Rosemond v. Autograph Register Co., 62 Minn. 374, 64 N. W. 925; Africa v. News Tribune Co., 82 Minn. 283, 84 N. W. 1019, 83 Am. St. Rep. 424, Hunt v. Malting Co., 90 Minn. 282, 96 N. W. 85.

But the decisions of the Supreme Court of Minnesota which are relied on proceed upon the theory that a corporation is estopped from availing itself of the defense ultra vires when otherwise it would be permitted to do an injustice, as, for instance, when the corporation has received the benefit or advantage from its act, and still retains the same. The case before us is not of that character. The notes which Johnson held evidenced the personal indebtedness of Hansen, not the indebtedness of the company. The original consideration for them passed nearly two years before the company was incorporated and two years and eight months before Hansen as its president assumed to bind it as guarantor. When Hansen sold his goods to the company the latter paid in full by issuing to him fully paid capital stock; and thereafter upon the faith and credit of the condition so established Hansen sold portions of the capital stock to others, and, on the other hand, the company went into the markets, did business, and incurred obligations. Johnson retained no lien upon the goods sold to the company, and was in no position to dictate or control the disposition of them by the owner. That he would not permit Hansen to sell them to a corporation was a threat he had no right to make in the absence of a purpose on the part of Hansen to defraud. There was no contract or promise that the corporation should buy the goods by paying the consideration or any part thereof to Johnson. The entire consideration was paid direct to Hansen, and Johnson knew it when he took Hansen's stock as collateral to the notes. There was no undertaking on the part of the

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company either to pay Johnson's claim or to guarantee it as part of the consideration it was to give for what it got. In this respect the case differs from National Bank of Commerce v. Allen, 33 C. C. A. 169, 90 Fed. 545.

The state by whose authority a corporation is organized, the stockholders who compose it, and its creditors whose demands have arisen in the course of its legitimate business are all interested in having it confined to the lawful exercise of its corporate powers. In this case the creditors especially would suffer by adding to the liabilities of the bankrupt company the personal debt of its president. The company was organized to transact a mercantile business. It had no power under its charter to guarantee the debts of others, and in this case it received and retained no consideration for doing so. That it was a small corporation, the stock of which was largely owned by one man who controlled its operations, cannot alter the principles of law which are applicable. It is urged that after the transactions in question occurred Hansen purchased the stock of the other stockholders; also that certain payments of interest upon the notes were charged to the expense account of the company. But these features of the case do not furnish the elements of an estoppel.

The order is reversed, with direction to disallow the claim.

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(149 Fed. 980.)

## NEEL et al. v. IRON CITY SAND CO.

(Circuit Court of Appeals, Third Circuit. January 25, 1907.)

No. 65.

1. SALVAGE—VOLUNTARY SERVICE.

The Return, having broken her shaft, was floating helplessly on the Ohio river, when she made signals of distress to libelants' steamboat, in response to which the latter made fast its tow to a telegraph pole on the river bank and went to the Return's assistance. The Return was without means to get out a line, and was in grave peril of drifting against the wall of a dam, or another obstruction below, when libelants' vessel took her to a landing. *Held*, that the service rendered by libelants' vessel was voluntary, and constituted a salvage service.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Salvage, §§ 14, 28.]

2. SAME—AWARD—AMOUNT.

A decree awarding libelants $25, and directing each party to pay their own costs, was inadequate; libelants being entitled to at least $100, with costs in the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Salvage, §§ 70, 71.

Salvage awards, see note to The Lamington, 30 C. C. A. 280.]

3. SAME—COURT OF ADMIRALTY—SALVAGE SERVICE—JURISDICTION.

Where a charge for landing a steamer in distress was really a claim for salvage, it was rightfully cognizable by a court of admiralty in a proceeding wherein the members of the salving vessel's crew could participate; and hence such claim was properly withdrawn from an action by the owner of the salving vessel in a state court against the owner of the vessel saved to recover on an account for services rendered, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Salvage, § 117.]

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Appeal from the District Court of the United States for the Western District of Pennsylvania.

L. C. Barton, for appellants.

Wm. A. Stone, for appellee.

Before DALLAS and GRAY, Circuit Judges, and LANNING, District Judge.

DALLAS, Circuit Judge. This is an appeal from a decree in admiralty in a suit which was instituted by the appellants to recover for salvage services claimed to have been rendered to the steam vessel Return. The District Court awarded the libellants the sum of $25, and ordered each party to pay its own costs. We have considered the case de novo, upon the only questions it involves. They are: (1) Was the aid which was rendered to the Return a salvage service, or one of towage merely? (2) If in fact and in law it was a salvage service, was the libelant precluded from asserting it to be so?

1. On March 11, 1902, the Return, having in tow a flat laden with sand, had broken her shaft and was floating helplessly upon the Ohio river. The steamboat George W. Moredock, by whose master and crew the service in question was rendered, was bound down the river, and to her the Return made signals of distress. The Moredock, in response, detached the coal-laden flat which she was towing, and, having made it fast to a telegraph pole on the river bank, went to the assistance of the Return. The small boat of the latter had been sent ashore "to telephone," and as this left her without means of getting out a line, she was likely to drift against the wall of the Davis Island dam, or the Bear Trap, below. The Moredock took her to a landing. She had been in grave peril, and her attainment of a place of safety was unquestionably due to the help which she asked for and received. The service, then, was rendered in saving a vessel which was in danger from a maritime misadventure, and, as it was rendered by persons who were under no obligation to render it, it is impossible to regard it otherwise than as a service of salvage. The case of The C. D. Bryant (D. C.) 19 Fed. 603, referred to by the learned proctors of the appellee, is plainly distinguishable. That case involved the consideration of the Oregon pilot act of 1882 (Sess. Laws 1882, p. 15), under which a pilot was bound to render aid to a vessel "in stress of weather, or in case of disaster"; and it was held to be the duty of the pilots subject to that act to give whatever assistance might be required of a pilot as such, without other compensation than that prescribed by the law, unless he thereby incurred "extraordinary danger and risk." But in this case the rendition of the service was voluntary, and no statutory duty or requirement is in question.

2. The owner of the George W. Moredock brought an action in a Pennsylvania court against the owner of the Return to recover upon an account for services rendered, in which was included a charge of $25 for "landing steamer Return," etc. But this charge was subsequently withdrawn from that suit, and properly so, because, as the claim was really for salvage, it was rightly cognizable by a court of admiralty, and in a proceeding wherein the members of the Moredock's former crew could participate.

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Having reached the conclusion that the service rendered was one of salvage, and that the libellants were entitled to have it so considered, we think it obvious that, while the award ought not to be a large one, the sum fixed by the decree appealed from is too small, and that the order as to costs was not as favorable to the libellants as it should have been. Therefore the decree is reversed, with costs to the appellants in this court, and the cause will be remanded to the District Court, with direction to enter a decree awarding to the libellants the sum of $100, with costs in that court.

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(149 Fed. 982.)

## MARTIN et al. v. HULEN & CO. et al.

(Circuit Court of Appeals, Eighth Circuit. October 6, 1906.)

No. 2,345.

BANKRUPTCY—ACTS OF BANKRUPTCY—MORTGAGES.

Within four months preceding the filing of a bankruptcy petition H. & Co. purchased a stock of goods for $3,000, paying $100 in cash and giving notes for the remainder. At the same time they gave a chattel mortgage on the goods so purchased to secure the payment of the notes, which mortgage covered all additions to the stock and all stocks that might thereafter be consolidated with it. Immediately after the purchase and execution of the mortgage H. & Co. consolidated such stock, which was worth the price agreed to be paid for it, with that which they had previously owned, acting in good faith and in accordance with the previous intention to unite the two stocks, so that the mortgage should cover both. *Held*, that the execution of such mortgage did not constitute an act of bankruptcy.

Appeal from the District Court of the United States for the Southwestern Division Judicial District of Missouri.

Oscar T. Hamlin, for appellants.

John L. McNatt (H. H. Bloss, on the brief), for appellees.

John S. Farrington, for Abe Lemaster.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. The question presented by this appeal is whether Hulen & Co., a copartnership, committed an act of bankruptcy in mortgaging, whilst insolvent, a stock of goods owned by them. Within the four months preceding the filing of the petition against them they purchased of one Lemaster another stock of goods for the sum of $3,000, paying $100 in cash and giving their notes for the remainder. At the same time they gave a chattel mortgage upon the goods so purchased to secure the payment of the notes. By its terms the mortgage extended to and covered all additions to the stock of goods and all stocks that might thereafter be consolidated with it.

Immediately after the purchase and the execution of the mortgage Hulen & Co. consolidated the Lemaster stock with that which they previously owned, and it is claimed by appellant that, as they were then insolvent, they committed an act of bankruptcy. The goods purchased from Lemaster were worth the purchase price, and the master found that Hulen & Co. acted in good faith, and that there was in fact no intention to give a preference. While transactions of that

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character by an insolvent should be closely scrutinized we are of the opinion that no act of bankruptcy was committed. The fact that the goods purchased were worth the price to be paid for them, and the good faith of the parties, repel all inference of intent to prefer. The reasonable presumption from the findings of the master is that both Hulen & Co. and Lemaster contemplated the union of the two stocks of goods, and that the mortgage should cover all of them. Therefore it cannot well be said that the latter was a creditor who after the creation of his claim secured a mortgage upon his debtor's property. What they did should be fairly regarded as a single transaction, and when it was consummated the estate of Hulen & Co. was in no worse plight so far as unsecured creditors were concerned than it was before.

The order of the District Court is affirmed.

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(149 Fed. 983.)

## BOWERS v. LAKE SUPERIOR CONTRACTING & DREDGING CO.

(Circuit Court of Appeals, Eighth Circuit. November 21, 1906.)

No. 2,322.

1. PATENTS—LICENSES—ASSIGNABILITY.

A license to use a patented invention that does not contain words importing assignability is a grant of a mere personal right to the licensee, which does not pass to the licensee's heirs or representatives, and which cannot be transferred to another without the express consent of the licensor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 316. Sublicensees and assignment of licenses for use or sale of patents, see National Phonograph Co. v. Schlegel, 64 C. C. A. 596.]

2. SAME—UNASSIGNABLE LICENSE—CONDUCT OF PARTIES.

A continuing assignable quality may be given to a license to use a patented invention originally unassignable, by facts and circumstances and the conduct of the parties during the continuance of the license.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 320.]

3. SAME—ASSIGNMENT.

Plaintiff executed a license authorizing B. to use certain patented inventions in connection with a hydraulic dredge, on payment of certain royalties. This license was not assignable, and after certain royalties had become due and were unpaid B. requested certain changes in the contract, including the insertion of words authorizing an assignment, which plaintiff agreed to make on B. sending a draft for the royalties then due, with accrued interest. B. did not pay such interest, however, and was never notified that it had been waived, but on B.'s death his executrix continued to operate the dredge and another dredge purchased, which, also, contained certain of the patented inventions, and paid royalties thereon, after which she transferred the dredges to defendant corporation under a bill of sale passing the entire dredging plant, business, and contracts, and all licenses to practice or enjoy patented inventions, together with the license papers. Defendant, with knowledge that executrix had been operating under the license and that she asserted a right to transfer and had made manual delivery thereof, continued to operate the dredge and patented appliances without disavowal of responsibility, or repudiating responsibility for royalties, which plaintiff thereafter demanded. *Held*, that defendant should be regarded as a licensee and as such was liable for royalties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 320.]

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4. SAME—ROYALTIES—AMOUNT.

Plaintiff executed an unassignable license, authorizing B. to use certain patents on dredging machines which had been installed on a hydraulic dredge known as the "West Superior"; B. agreeing to pay specified royalties therefor. B. thereafter applied to have the license made assignable, and for reduction of the royalty rate, which plaintiff refused to do unless B. paid certain interest on past-due royalties and equipped another dredge of a specified capacity. B. performed neither of these conditions, but later purchased a dredge containing certain of the patented inventions which had been emancipated from further payment of royalties, but which was scarcely half the capacity required by plaintiff in his offer to reduce, after which both B. and his executrix paid royalties at the reduced rate until the executrix transferred all the dredges, licenses, etc., to defendant corporation with plaintiff's consent. *Held*, that there was no valid contract for the reduction of the royalty rate, and that defendant was therefore liable only for royalties on the work done by the original dredge at the price originally fixed in the license.

## In Error to the Circuit Court of the United States for the District of Minnesota.

This was an action by Alphonzo Benjamin Bowers against the Lake Superior Contracting & Dredging Company to recover royalties alleged to be due under a license for the use of certain patented inventions connected with hydraulic dredges. At the conclusion of the evidence the trial court directed a verdict for the defendant, and the plaintiff prosecutes this proceeding in error.

Bowers was the owner of a number of patents on dredging machines, and one Barker was the owner of a hydraulic dredge known as the "West Superior," which contained some of the patented features and which he had been operating without the consent of Bowers in the performance of a contract with the United States to do certain dredging work in the harbors of Duluth and Superior at the western end of Lake Superior. In May, 1899, Bowers and Barker entered into a contract embracing a settlement for past violations, and granting to Barker a license to use the patented inventions on Lake Superior and tributary waters for the remainder of the terms of the patents. The license ran to Barker alone, and not to his heirs and assigns. It was therefore not assignable. The agreed royalty was one cent per cubic yard of material excavated under the government contract, and 2½ cents per cubic yard of material excavated under other contracts. Barker operated under the license during the season of 1899. In the autumn of that year he requested by letter certain changes in the contract of license, and on November 9, 1899, Bowers replied, granting his request only in part, and authorizing the interpolation in the written contract of certain words, among which were "heirs, representatives and assigns," for the purpose of making the license assignable. Bowers' consent to this, however, was conditional. After saying that he expected interest at the rate of 7 per cent. upon the several amounts of royalty then past due and unpaid, he concluded his letters as follows: "Please send me drafts for these sums with said interest. The aforesaid changes in the license are to be made and become effective only on receipt of said draft by me." One of the important questions in the case is whether this modification ever became effectual.

June 18, 1900, Bowers made a written proposition which was accepted by Barker, the licensee, that after that month he would allow a rebate of a half cent per yard on the government work provided the latter promptly made his monthly payments of royalty, and also had at the commencement of the season of 1901 a second dredge of specified capacity ready for work, the reduced rate to apply to the government work done by both dredges. During the remainder of the season of 1900 Barker operated the West Superior dredge and paid royalty at the half-cent rate. Before the next season opened Barker bought a dredge known as the "Northwestern," which had been built some years before under license from Bowers and emancipated from further payment of royalty by the payment of a lump sum. Barker then died, leaving a will wherein his wife was named executrix. Mrs. Barker, having qualified, operated both dredges during the entire season of 1901, the West Superior on

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government work and the Northwestern on private contracts. She made monthly reports to Bowers of the work done by the former, and made payments of royalty down to November at the reduced rate, but made no reports or payments in respect of the work of the Northwestern.

In the latter part of November, 1901, a controversy arose between Bowers and Mrs. Barker as to whether the dredge Northwestern came under the supplemental contract of June 18, 1900, and its operation, therefore, became the subject of royalty, and, if not, then whether the estate should pay royalty of one cent per yard of the work done by the Superior, which was the rate prior to the reduction agreed upon in view of the employment of a second dredge. This controversy was settled by the payment of a lump sum materially in excess of the royalty due for the work of the West Superior on the half-cent basis, but the settlement receipt did not show which theory was adopted.

In April, 1902, Mrs. Barker sold to the defendant dredging company the entire dredging business and property, including the dredges West Superior and Northwestern. The bill of sale contained this clause: "This instrument is intended to include and convey all patent rights and all licenses to practice or enjoy patents and patented inventions appertaining to the dredging business owned or controlled by first party." The first party in this bill of sale was Mrs. Barker, the executrix. At the consummation of the sale there were turned over to the defendant dredging company the original Bowers license covering the Northwestern and also the license to Barker covering the West Superior. Thereafter the defendant operated the latter on the government contract and on private work, and also operated the Northwestern exclusively on private work, but it made no reports of work done and no payments of royalty. Bowers' action was brought to recover royalty claimed to be due on account of the work done by both dredges.

John H. Miller (H. G. Gearhart, on the brief), for plaintiff in error.

Thomas J. Davis (Theodore Hollister, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The assignment of error relied on is that the trial court erred in directing a verdict for the defendant. The action of Bowers for royalty is founded upon the assertion of the existence between him and the defendant dredging company of the relation of licensor and licensee of his patented inventions. It is claimed that such relation is deducible from the original nonassignable license to Barker, the amendment thereof by the insertion of the words "heirs, representatives and assigns," the supplemental contract authorizing the use of a second dredge and the reduction of the agreed royalty rate, the death of Barker, the passing of the license to his wife as executrix, her sale of the dredges and all appertaining licenses to the defendant, and its acceptance thereof and continued use of the dredging machines.

It is also claimed that, even though there was no amendment of the license to Barker during his lifetime, it was in fact treated as assignable by both Bowers and Mrs. Barker, the executrix, and that if the nonassignable character of a license is once waived as to one assignee it is by force thereof waived as to all succeeding ones, and the license thereupon takes its place among those that may be transferred by the act of the holder or by operation of law at his death. It is further claimed that, aside from the foregoing, when the defendant accepted from Mrs. Barker as executrix the bill of sale of the dredges

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and licenses pertaining thereto and received into its possession the Barker license, and without repudiating it continued the operation of the dredges, it cannot be heard to say that it was acting adversely to the plaintiff or that its position was antagonistic to the validity of his patent rights.

First as to the original license and the question whether it was amended in respect of its nonassignability during Barker's lifetime. A license to use a patented invention that does not contain words importing assignability is a grant of a mere personal right to the licensee which does not pass to his heirs or representatives and which cannot be transferred to another without the expressed consent of the licensor. Hapgood v. Hewitt, 119 U. S. 227, 234, 7 Sup. Ct. 193, 30 L. Ed. 369; Oliver v. Rumford Chemical Works, 109 U. S. 75, 82, 3 Sup. Ct. 61, 27 L. Ed. 862; Troy Iron & Nail Factory v. Corning, 14 How. (U. S.) 193, 216, 14 L. Ed. 383.

Both parties to this controversy agree that, tested by this well-established rule, the license from Bowers to Barker was not assignable while in its original form, unchanged by agreement. But Bowers claims that there was evidence sufficient to require submission to the jury of an agreement between him and Barker that words importing assignability should be inserted at the appropriate place in the contract. The evidence upon the subject was substantially as follows: Shortly after the execution of the license Barker, who was in Wisconsin, wrote to Bowers, who lived in California, requesting that four specified changes be made, and that a new contract of license be drawn embodying them, and be also signed by another party who was supposed to have an interest in the patents. Bowers replied, denying that any one else had any substantial interest, declining to make two of the changes, consenting to one in a modified form, and agreeing to the remaining one making the license assignable by the insertion of the words "heirs, representatives and assigns." He did not adopt Barker's suggestion that a new contract be prepared. He called Barker's attention to the fact that some installments of royalty were past due and unpaid, and said that he should expect interest thereon at the rate of 7 per cent. per annum. He concluded his letter as follows:

> "Please send me drafts for these sums with said interest. The aforesaid changes in the license are to be made and become effective only on receipt of said draft by me."

The evidence leaves it uncertain whether Barker paid the past-due royalty by draft as requested or by promissory note. If it were important whether he paid by draft instead of by note, it should be said that there was a sufficient conflict in the evidence to require a submission to the jury. But, whatever the fact in this particular may have been, it was admitted by Bowers that Barker did not pay either by draft or by note the accrued interest upon the past-due installments of royalty. Bowers testified that he waived the interest, but there is no evidence in the record that such waiver was ever communicated to Barker. A waiver of the condition in whole or in part should have been brought to the attention of Barker. So far as the record shows, Barker's conduct was entirely consistent with the position that he did not think it worth while to accept the changes that Bowers was willing

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to concede. What he subsequently paid, whether by draft or by note, was no more than he owed and should have paid had nothing whatever been said about the amendment of the license. About seven months later Bowers and Barker met in Wisconsin and agreed upon the supplemental contract of June 18, 1900, but it contains no recognition of any prior changes in the original license, nor does it appear from the record that any discussion of the matter occurred between them.

As in the making of a contract so in the amendment of one there should be a meeting of the minds of the parties. Consent by one party to an amendment upon a specified condition to be precedently performed by the other must be followed by performance, unless the condition is waived by him who imposed it and the fact of waiver made known to the other. The condition is to be considered as rejected if, without knowledge of the waiver, there is failure to perform it. It is quite clear from Bowers' subsequent conduct that he regarded the license as having been made assignable. Since the license by its terms ran during the life of the patents, an assignable quality would have been of such benefit to Barker that slight evidence would have been sufficient to show his acceptance of an offer of it, but an acceptance cannot be inferred merely because it would have been beneficial. There is nothing in the evidence showing that Barker was aware of the waiver by Bowers of the condition, and nothing in his acts indicating that he regarded the provisions of the original license as having been changed. The trial court was, therefore, right in holding as it did that upon the evidence adduced Bowers and Barker did not come to an agreement upon the proposed amendment. But it is also clear that after Barker's death both Bowers and the executrix regarded the license as having passed to the latter. She continued the operation of the dredge West Superior, which was the subject thereof, without seeking or procuring from Bowers any new or additional authority, nor did Bowers himself consider that any act of his was necessary to confer upon her the lawful right to proceed in the same manner and under the same conditions as existed prior to her husband's death. She continued to make reports of work done by the dredge West Superior, and to make payments of royalty at the half-cent rate which her husband had been paying for the greater part of the preceding season. And when the controversy over the work of the emancipated dredge Northwestern, whether it should be considered as the second dredge under the contract of June 18, 1900, and, if not, whether she should pay the one-cent rate for the work of the West Superior, was settled by the payment of a less sum than was due upon either theory, Bowers and the executrix expressly agreed that the amount of royalty to be paid in the future should be determined by the contracts, letters, arrangements, and agreements as they existed prior to the death of Barker. This was evidently for the purpose of rebutting any presumption that a new arrangement was entered into with the executrix differing from that which theretofore existed, and it was consistent with a recognition that the license with its various conditions and modifications became at the death of Barker an asset of his estate. There was no evidence of the granting of a new license to the executrix. The



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conduct of the parties showed that they considered the old one to have passed by operation of law, a species of assignment, to the estate of the original holder.

It is true, as contended by defendant, that a license may be created by parol and be established by clear implication from proven facts and circumstances (Solomons v. United States, 137 U. S. 342, 11 Sup. Ct. 88, 34 L. Ed. 667; McClurg v. Kingsland, 1 How. [U. S.] 202, 205, 11 L. Ed. 102; Anderson v. Eiler, 1 C. C. A. 659, 50 Fed. 775; Withington-Cooley Mfg. Co. v. Kinney, 15 C. C. A. 531, 68 Fed. 500), but it is also true that by like implication arising from facts and circumstances and the conduct of the parties a continuing assignable quality may be given to a license originally unassignable. That the proof thereof rests in parol is not material where no one is concerned except the parties and their privies. Whatever Barker's position may have been, both Bowers and the executrix regarded the license as having passed to the latter by operation of law, and not as being held by her by reason of any new contract to that end. While this condition subsisted the executrix sold and gave to the defendant a bill of sale of the entire dredging plant, business, and dredging contracts, including the dredges Northwestern and West Superior and "all licenses to practice or enjoy patented inventions," and as part of the transaction turned over to defendant the Barker license affecting the West Superior and also the license papers connected with the Northwestern. The defendant accepted the bill of sale so worded and received and retained possession of the Barker license, and thereafter, without repudiating the license before this controversy arose, it continued the use and operation of the dredge to which it related. Bowers acquiesced in this last transfer. His attitude is indicated by his demand for royalty. After the death of Barker and until this controversy arose all parties treated the license as being assignable. That the defendant did so is shown by its knowledge that the executrix had been operating under the license, and that she asserted a right to transfer it and made manual delivery thereof, and by the fact that it accepted the license, and continued the use of the dredge with its patented appliances without disavowal of responsibility. It should not be allowed to occupy a position in which, if sued in tort for an infringement, it could interpose in defense the contract of license, and, if sued for royalty under the license, it could then deny any contract relation, and insist that its acts were in hostility to the validity of the patents. We are of the opinion that under the evidence the defendant should have been held as a licensee.

As the case must be again tried, it will be helpful to express our opinion upon the measure of recovery—whether royalty should be computed upon the work of both dredges or be confined to that of the West Superior, and, if the latter, then at what rate.

The supplemental contract of June 18, 1900, between Bowers and Barker did not impose upon the latter an obligation to procure and operate a second dredge. It merely gave him the option to do so, and, if exercised, applied a reduced rate to the excavations of both dredges. At this time Barker contemplated the construction of another dredge, but he seems to have abandoned the project. He pur-

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chased the Northwestern, which, though licensed by Bowers, was emancipated from the future payment of royalty. Moreover, this dredge had scarcely half of the capacity required by Bowers in the option to Barker. What Barker's purpose was does not appear because he died before the Northwestern was put to work the ensuing season. Apart from the provisions of the contract of June 18th, it could have been operated without liability of any kind to Bowers. When the executrix operated both the Northwestern and the West Superior after her husband's death she availed herself of the reduction of the one-cent rate upon the government work done by the latter dredge to the half-cent rate which was to prevail upon compliance with the option. Her husband had been paying this same reduced rate during the greater part of the preceding season. Were this all, it might be inferred that it was the intention that the Northwestern should perform the part of the second dredge, and that its emancipation from royalty was waived for the time being. But, on the other hand, the executrix made no reports of the work of the Northwestern, and made no payments on account thereof before the controversy arose at the end of the season of 1901. Near the beginning of the following season she made the sale to the defendant. The settlement of the controversy did not indicate what theory was adopted, but it fairly appears that the executrix through her counsel persisted in claiming the continued exemption of the Northwestern from the payment of royalty. Considering the acts of the parties, the marked difference in capacity of the Northwestern from that of the second dredge required by Bowers, and the fact that it had been emancipated and was the subject of unrestricted use, we are of the opinion that the terms of the option had not been complied with, that the Northwestern remained a free dredge, and that recovery should be limited to royalty upon the operation of the West Superior. As there was no reduction by the employment of a second dredge, the rates for government and private contract work obviously remained as originally fixed in the license.

The judgment is reversed, and the cause is remanded for a new trial.

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(149 Fed. 989.)

## MURRAY CO. v. CONTINENTAL GIN CO.

(Circuit Court of Appeals, Third Circuit. January 6, 1907.)

No. 20.

1. PATENTS—ASSIGNMENTS—ACKNOWLEDGMENT.

The acknowledgment of an assignment of a patent relates to the date of the assignment.

2. SAME—INFRINGEMENT—FEEDERS FOR COTTON GIN.

The Murray patent, No. 472,607, for an improvement in apparatus for elevating, distributing, and feeding seed cotton to gins by pneumatic action, the principal feature of which is an automatic valve produced by the cotton itself whenever it becomes choked in a chute, which shuts off the suction and the delivery of cotton to that particular chute until the stoppage is overcome, was not anticipated, and, while the elements of the machine are old, discloses a new and patentable combination which produces new and decidedly useful result. Also *held* infringed as to claims 1, 2, 9, and 12.

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3. SAME.

The Murray patent, No. 644,532, for improvements in cotton elevators and gin feeders, is void for anticipation.

Appeal from the Circuit Court of the United States for the District of Delaware.

See 126 Fed. 533.

Oliver Mitchell and Edmund Wetmore, for appellant.

Melville Church, for appellee.

Before DALLAS and GRAY, Circuit Judges, and CROSS, District Judge.

CROSS, District Judge. The bill of complaint in this cause relates to letters patent No. 472,607, 488,446, and 644,532, and alleges that they have been infringed by the defendant. As to No. 488,446, however, counsel for the complainant has, since the commencement of the suit, abandoned all claim for relief thereunder, and it will, therefore, require no further mention. No. 472,607 was issued April 12, 1892, to Stephen D. Murray, assignor to William Burr and John H. Deems, for new and useful improvements in apparatus for elevating, distributing, and feeding seed-cotton to gins, and the bill of complaint alleges that the defendant has infringed claims Nos. 1, 2, 9, and 12 thereof, which are as follows:

"(1) In apparatus for elevating, distributing, and feeding seed-cotton to gins, the combination, with a suction pipe or tube, of a box or casing having side air-passages and a central screened space and a chute or feeder communicating with said space, substantially as described.

"(2) In apparatus for elevating, distributing, and feeding seed-cotton to gins, the combination, with a suction pipe or tube formed in its under side with an opening of a box or casing having a central space communicating with said pipe or tube and provided with side air-passages having inner screen-walls and a chute or feeder communicating with said central space, substantially as described."

"(9) In apparatus for elevating, distributing, and feeding seed-cotton to gins, the combination, with the chute or feeder, of a set of feed-rollers supported at the bottom of said chute or feeder and means for regulating the feed of said rollers, substantially as described."

"(12) The combination, with a suction-pipe, of the box or casing constructed of two or more central spaces and provided with the screened air-passages and a chute or feeder suspended beneath each of said central spaces, substantially as described."

Before discussing the merits of the case, we will first briefly consider the point made on behalf of the defendant, that the complainant has not shown title to this patent. Several alleged defects are set forth in the brief, but the only one urged at the oral argument was that notwithstanding the assignments, so far as appears, were duly executed and delivered at the times they were respectively dated, they nevertheless, having been acknowledged several years subsequently, only took effect, in the absence of strict proof of the assignments as at common law, from the dates of their acknowledgment, and that under the evidence no infringement of the patent was shown between those

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dates and the time of filing the bill of complaint herein. In volume 1 of Am. & Eng. En. of Law, title "Acknowledgments," p. 524, the following rule is laid down:

"In the absence of a statute designating the period within which acknowledgments must be made, it is immaterial when a deed is acknowledged. The acknowledgment may be made after bringing suit when the instrument is offered in evidence."

It is true that in the case of Hollingsworth v. Flint, 101 U. S. 591, 25 L. Ed. 1028, where the acknowledgment and privy examination of a married woman was made after the commencement of the suit, it was held that the deed could not be offered in evidence; but the decision was put by Mr. Justice Harlan expressly upon the ground that at the time of the commencement of the suit the deed had not been acknowledged as required by the Texas statute in order to pass the title of a married woman under the law of that state. In Doe v. Dugan, 8 Ohio, 87, 31 Am. Dec. 432, a deed executed by a sheriff while in office was acknowledged by him after his term of office had expired, and it was held that such acknowledgment related back to the time of the execution of the deed. In Lanning v. Dolph et al., Fed. Cas. No. 8,073, a deed was offered in evidence in an action in ejectment, and objection was made to its admission because the deed was acknowledged and recorded after the suit was brought. Mr. Justice Washington, who tried the case, held the objection invalid, since the acknowledgment and recording related back to the execution of the deed. An acknowledgment is nothing more or less than a substitute method of proving a deed, and does not affect its validity in the least. Section 4898 of the Revised Statutes, as amended by Act March 3, 1897, c. 391, 29 Stat. 692 [U. S. Comp. St. 1901, p. 3387], simply provides a new method of proof. The evident intent of the act was to substitute proof of execution by acknowledgment, instead of by the production of the subscribing witness, if there were one, or proof of the handwriting of the assignor, if there were no subscribing witness. In De Laval Separator Co. v. Vermont Farm Mach. Co. (C. C.) 109 Fed. 813, it was held that assignments which were acknowledged before the passage of that act were admissible in evidence thereunder, and that the act referred "to the time," to use the language of the court, "when the acknowledgment is produced in evidence, rather than to the time when it was taken." The rule thus laid down was approved by the Circuit Court of Appeals for the Eighth Circuit in Lanyon Zinc Co. v. Brown et al., 115 Fed. 150, 53 C. C. A. 354. The complainant in this case had in his possession, and produced at the hearing, assignments of the patent in suit acknowledged by the assignors, which showed at least a prima facie title thereto in the complainant.

On the part of the defendant it is maintained that the Munger patent, No. 308,790, dated December 2, 1884, the Sailor patent, No. 362,041, dated April 26, 1887, and the Schulze patent, No. 478,473, dated July 5, 1892, narrowed the art to such an extent that the complainant's patent, No. 472,607, must be narrowly and strictly construed in order to maintain its validity, and that thus construed the defendant's ap-

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paratus did not infringe claims 1, 2, and 12 thereof. It is unnecessary to consider at any considerable length in this connection the Munger or the Sailor patent, although they both disclose a pneumatic cotton elevator, since the former has only a belt distributor, and the latter valves or deflectors, as the patentee calls them, whereby the passage of the cotton into the different vacuum boxes, arranged in series, is regulated, not automatically, but by hand. The Schulze patent undoubtedly represents the highest development of the art prior to the Murray patent under consideration, and it was upon that patent that counsel for the defendant mainly relied to show anticipation. It is quite true that the Schulze and Murray machines are in some respects alike, and from a mere cursory examination they might seem to be so much alike that very little, if anything, of novelty or invention could be discovered in the Murray patent; but, when carefully examined, it will appear that, while the elements embodied in the Murray patent are old, they are, nevertheless, combined and organized in such a way as to accomplish a new and decidedly useful result. What Murray more especially claims by his patent is an automatic valve produced by the seed-cotton itself, so that, when the cotton becomes choked in the chute and fills it to the top of the screen-walls, the air suction is entirely cut off, and the delivery of cotton to that particular chute is suspended until the stoppage in the chute is overcome, or, adopting the language of the patentee:

"When the cotton accumulates in the feeder too fast and reaches to the top of the screen-walls of the space 5, it is evident that the suction from pipe or tube 1 will be cut off and the cotton will cease to be drawn in; but as soon as one or more of the feeders have fed out sufficient of the cotton to allow some part of the screen-walls to be free or open, the suction again becomes effective in the manner already explained."

It is true that the claims do not in terms refer to the automatic action of his system, but we think such reference is wholly unnecessary. He sets out the orderly arrangement of the parts intended to produce the result, and which, as the evidence shows, do produce the result he has described in his specifications. The patent cannot be read without discovering that the main object of the inventor was to install an automatic valve produced by the seed-cotton itself, and which would at all times, in case of chokage of the cotton, prevent the cotton in the chute from rising above the bottom or lower side of the cotton pipe. Under his system the choked cotton, if any, is all contained within the perpendicular chute, and is in a position whence, as soon as the choke is relieved at the bottom of the chute, the cotton will fall by gravity; whereas, not only in the Schulze system, but also in all of the other systems, the cotton when choked is liable to be forced ultimately beyond the chute itself into the internal portion of the cotton pipe, from which position it cannot, under any circumstances, be released by gravity. The result achieved by Murray's device is accomplished by having the cotton feed-pipe located above the air pipe, as also by so arranging the screened air-passages that they do not extend upwardly above the bottom of the cotton feed-pipe. Schulze approximates this same result, but does not attain it, nor was it in his mind,

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since his screened air-passage extends upward to the very top of the cotton feed-pipe, with the result that, when the cotton becomes choked in the chute, it will continue to fill up the chute, as it will also in the Murray system, until the air suction has been completely shut off by the choked cotton, but this will not happen under the Schulze device, owing to the height and location of the screen, until the cotton will have been forced over the bend or angle of the cotton-pipe and into the lateral portion thereof, whence it cannot be relieved by its own weight. Furthermore, Schulze, in order to accomplish what he did, deemed it necessary to adopt, and did adopt, various mechanical cut-offs and valves which are unnecessary to the Murray patent. Our conclusion, therefore, is that Murray's patent discloses a decided advance in the art, and very clearly shows novelty and invention.

What has been said pertains more appropriately to claims 1, 2, and 12, but we think claim 9 is also valid. It relates to feed-rollers supported at the bottom of the chute, with means to regulate the feed of the rollers. The use of such rollers was undoubtedly old in the art, but as theretofore used the rollers were located at or near the gin. Formerly the cotton fell from the chute upon a moving apron or conveyor-belt, which carried it to the feed-rollers, whence it was fed to the gin. Murray does not require the conveyor-belt, and locates the feed-rollers directly at the bottom of the chute, where they aid in releasing the cotton from the chute, a function which they did not at all perform before. Again, they pay it out at a predetermined rate, which may differ at every chute, whereby, in connection with the other elements of the combination, no more cotton is elevated by the machine than can be properly distributed and fed out. The claim, therefore, discloses in our opinion a true combination, and not a mere aggregation, and is also valid.

The defendant's device clearly infringes all of the claims in controversy, unless such claims are to be read with literal exactness. The defendant has unquestionably adopted and embodied in its apparatus all of the essential elements of the Murray patent, except that it claims that it does not use side air-passages and a central screened-space, emphasizing particularly the words "passages" and "central." It contends that both Munger and Schulze have a side air-passage and a screened-space, which space, however, is not central between side air-passages, and that consequently, in order to avoid the claims of those patents, and to disclose novelty, Murray was compelled to claim as he did. But, as already stated, neither Munger nor Schulze accomplishes what Murray did, nor do they show the same mode of operation. Murray devised what may very properly be called a system or mode of operation, whereby certain old elements of a cotton elevator and distributor, as the result of new organization and arrangement, produced automatic regulation of the device by the cotton itself, and it would be most unfortunate in view of what he has accomplished if we were compelled to construe his claim so narrowly that an infringer could appropriate the entire principle of his invention by using one air-passage, instead of two, and simply conjuring with the meaning of the word "central."

Counsel for the complainant have indicated how the different

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elements comprised in the claims of the Murray patent may be so correlated and rearranged as perhaps to more clearly express Murray's invention, without doing violence to the claims themselves. Such rearrangement is as follows:

"In apparatus for elevating, distributing, and feeding seed-cotton to gins, in combination, a cotton pipe, an air pipe having side air-passages, a screen space organized, as described in the specification, below the cotton pipe, a chute or feeder communication with said space, the said space being central between the cotton pipe, air pipe, and chute, as described."

It would seem that the word "central," as used in the claims, is susceptible of the meaning they have attached to it. The claims do not show with entire precision what is meant by the words "central space"—that is to say, it does not clearly appear with what other elements the "central space" must be arranged in order that it may properly be defined as "central"—but, wherever it is located, we certainly find nothing in the claims which imperatively demands that it be located, as claimed by the defendant, between the side air-passages. It would seem that "central space," as used, may mean no more than the space inclosed within the box or casing, and that the phrase "side air-passages" is met by locating them upon one side only, as well as upon both sides. The language used does not require air-passages located on both sides, or on opposite sides, or anything equivalent thereto. There must be side air-passages, but that requirement would be met if there were a plurality of them located upon one side, equally as well as it would be if they were located upon two sides, or upon opposite sides. What has been said applies more especially to claims 1 and 2. Claim 12 is still more general, for in it there is nothing whatever said about side air-passages. All that this claim requires is that there shall be air-passages, and that they shall be screened. Since this is so, there surely is no invention in merely reducing the number of air-passages from two to one, as the defendant has done; nor, again, would such reduction conflict with the Schulze patent or other prior patents, because it is the location of the screened-passages in the Murray patent which, in combination with the other elements, produces its automatic feature, and this in principle the defendant has adopted. Upon the whole the complainant's interpretation of the claims is not unreasonable, and we would feel entirely justified in adopting it were it necessary under the circumstances to do so, in order to sustain the patent, but we do not think it is. Murray's invention, considered as an entirety, rested largely, as already stated, in the automatic valve produced by the cotton itself whenever it became choked in the chute, and which automatic function was accomplished by a new organization of old elements set forth in the claims as interpreted and described in the specifications, and it is this automatic feature which the defendant has appropriated by a like or an equivalent organization of the same elements. The defendant's device has, it is true, but a single screened air-passage, but that, as we have seen, is immaterial, since it is located and arranged in relation to the other elements, so as to perform the identical function which the screened air-passages of the Murray patent perform.

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That claim 9 has also been infringed is too apparent to require extended remark. The claim provides for "a set of feed rollers supported at the bottom of said chute or feeder." The defendant contends that the phrase "supported at the bottom" requires the said rollers to be attached to, and to form a part of, the elevator and distributor, while in its device the feed-rollers, although supported directly at the bottom of the chute, are nevertheless detached from and are not a part of it, but of the gin. In other words, it is claimed that since the feed-rollers have been, as it were, sawed apart from the chute and removed therefrom by the width of a saw-cut, infringement of the Murray patent has been avoided. The mere statement of the proposition shows its lack of merit. The entire principle, and, indeed, the very language of the claim, is sought to be appropriated by transparent evasion.

Patent No. 644,532, the second in suit, is invalid. It was clearly anticipated by the Munger patent, No. 680,165. The only apparent difference between the construction described in claim 8, the only one relied upon, of the Murray patent now under consideration and the Munger patent, is that the Murray patent has a plurality of feed-rollers, whereas Munger has a single feed-roller which co-operates with an adjustable or spring pressed breast, a mechanical equivalent. The Murray patent does indeed claim a screw conveyor, whereas in the Munger patent air is used as the conveyor, but, even if these conveyors are not equivalents, still a screw-conveyor is clearly portrayed and described in a prior Munger patent, No. 547,671, where it is located substantially in the same place and performs practically the same function that it does in the patent in suit.

Upon the whole case, therefore, we conclude that the first patent in suit, No. 472,607, is valid, and as to claims 1, 2, 9, and 12, has been infringed by the defendant, and that the second patent in suit, No. 644,532, is invalid.

The decree below should be reversed, with costs, and a decree entered in conformity with the views hereinabove expressed.

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(149 Fed. 995.)

## MOTSINGER DEVICE MFG. CO. v. HENDRICKS NOVELTY CO.

(Circuit Court of Appeals, Seventh Circuit. November 9, 1906.)

No. 1,264.

PATENTS—INFRINGEMENT—CONTROLLER FOR SPARK GENERATORS.

The Motsinger patent, No. 642,869, for a controlling means for spark generators, adapted to maintain a constant speed of a driven shaft in a gas engine by means of a peripheral frictional contact between a driving wheel and a pulley on such shaft, and means whereby the grip of one wheel upon the other is automatically so varied that, though the driving wheel may rapidly change from low to high speed, the speed of the driven pulley will not substantially change, in view of the prior mechanical art in which all the means employed were old, is not a pioneer patent, and must be limited to the substantial construction shown. As so limited *held* not infringed.

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Appeal from the Circuit Court of the United States for the District of Indiana.

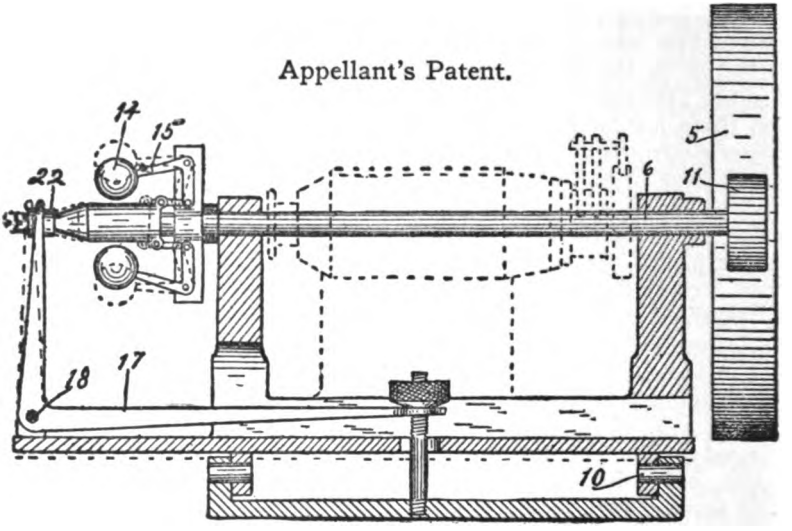
The bill is to restrain infringement of letters patent No. 642,869, issued Feb. 6th, 1900, to Homer N. Motsinger, for a new and useful Controlling Means for Spark Generators.

The claim relied upon is as follows:

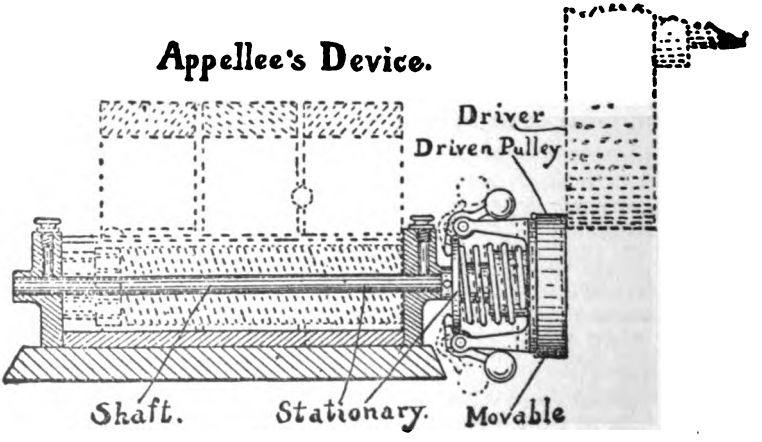
"In a mechanical movement for maintaining a constant speed of a driven shaft, a driving pulley, a driven shaft carrying a pulley adapted to engage peripherally the driving pulley, and a speed controlled governor carried by said driven shaft, and means for throwing said driven pulley out of and into engagement with the driving pulley."

The Circuit Court dismissed the bill for want of equity. The drawing in appellant's patent is as follows, and appellee's device is illustrated as follows:

Appellant's Patent.




Appellee's Device.

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Other patents cited in the record are as follows:
No. 195,322, Sept. 18, 1877, J. S. Adams.
No. 210,847, Dec. 17, 1878, W. H. Fruen.
No. 230,264, July 20, 1880, E. T. Gilliland.
No. 267,965, Nov. 21, 1882, F. Anderson.
No. 295,060, March 11, 1884, C. J. Shuttleworth.
No. 345,670, July 20, 1886, A. Campbell.
No. 352,368, Nov. 9, 1886, C. E. Skinner.
No. 367,241, July 26, 1887, A. W. Schleicher.
No. 368,265, Aug. 16, 1887, G. T. Woods.
No. 403,376, May 14, 1889, N. Rogers et al.
No. 437,704, Oct. 7, 1890, R. Lundell.
No. 438,077, Oct. 7, 1890, D. Mackie.
No. 438,204, Oct. 14, 1890, E. Thompson.
No. 440,590, Nov. 11, 1890, F. D. Hardy.
No. 452,976, May 26, 1891, H. D. Goodwin.
No. 456,392, July 21, 1891, H. A. Ballard.
No. 462,348, Nov. 3, 1891, C. E. Chinnock.
No. 491,829, Feb. 14, 1893, J. A. Williams.
No. 504,132, Aug. 29, 1893, M. Moskowitz.
No. 633,516, Sept. 19, 1899, R. L. Hunter.
No. 659,194, Oct. 2, 1900, F. W. Baynes.
No. 751,993, Feb. 9, 1904, G. J. & G. Pelstring.
No. 757,891, April 19, 1904, I. J. Daily.
Further facts are stated in the opinion of the court.

Chester Bradford and Arthur M. Hood, for appellant.
H. V. Lockwood, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge. The mechanism employed by Motsinger, to put into effect the idea embodied in the patent in suit, is the fly wheel of a gas engine in frictional contact with a smaller wheel or pulley connected with the spark generator, together with means for throwing the generator pulley out of and into engagement with the fly wheel; the purpose being to so vary the contact or grip of the pulley upon the wheel, that when the wheel starts at a low rate of speed, the pulley will at once revolve at a much quicker speed, but when the wheel attains a high rate of speed, the speed of the pulley will not be drawn along with it—a speed approaching constancy being in that way secured to the pulley, and to the spark generator dependent on the pulley for its revolutions.

Laying aside for the moment the argument that Motsinger for the first time gave to the world the idea of a spark generator, "self contained," and looking to the mechanism only in which that idea is said to be embodied, we ascertain from the prior art that one wheel driven by another, through the device of frictional contact, is old. Also that a large wheel, driving a small wheel peripherally, around axes in different alignment, though by cog engagement, is old; so that Motsinger did nothing more than to substitute in the wheels of the old art, engagement by friction for engagement by cogs, a substitution that apart from all other considerations—frictional engagement being well known—would not in our judgment constitute pioneer invention. Indeed, outside of the concept of a "self contained" generator as a resultant, we do not think that any such claim would be urged.

Laying aside, again, for the moment, the argument that Motsinger

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gave to the world, for the first time, a spark generator "self contained," it is plain that the immediate mechanical purpose of his frictional contact—the constancy of motion to be obtained for one of the wheels—is itself old, that being the purpose of nearly all of the devices where two wheels are frictionally engaged. And when we come to the mechanical means, other than those already pointed out, through which constancy of motion is effected, including the speed controlled governor—that is, the means whereby the grip of the one wheel upon the other is automatically so varied that though the one wheel may rapidly change from low to high speed, the speed of the other wheel will not substantially change—we find that they, too, are old, varying only with the kind of mechanism to which they are applied; so that the chief consideration in favor of this patent, as a pioneer invention, resides in the claim that in this combination for the first time, was made practicable a spark generator so "self contained, that it could be mounted in an operative position with any gas engine of any kind."

But standing in the way of this consideration is the fact, that before the Motsinger patent, there were generators, also self contained, that could be mounted in an operative position with any gas engine of any kind. Williams patent, No. 491,829, Thompson patent, No. 438,204, Rogers patent, No. 403,376. And standing also in the way of this consideration is the fact that before the Motsinger patent, generators were driven by the peripheral engagement of driving and driven pulleys; the only difference in this respect being that in the previous devices, the engagement was by cog wheel; so that Motsinger did not, for the first time, give to the world either the idea of a spark generator self contained, or a practical mechanism through which such spark generator could be operated.

Taking into consideration then just what Motsinger has done—the constructive idea being old, the mechanism being old, except his substitution of frictional peripheral engagement (frictional engagement being old) for cog peripheral engagement—we are forced to the conclusion, that though Motsinger's patent may cover a valuable improvement, it is not a pioneer patent, and must therefore be limited to the substantial mechanical means therein pointed out, or their mechanical equivalent.

Except to the extent that appellee's device has "a driven shaft carrying a pulley adapted to engage peripherally the driving pulley," the mechanical means employed by appellee confessedly differ from those of appellant. The contention of appellant, however, is that any arrangement of wheel and pulley whereby the center of the frictional contact or grip is near the periphery, or away from a common axis, is an engagement peripherally, and comes, thereby, within his specific mechanical construction; so that what is meant by the word "peripherally"—always remembering that the patent is not a pioneer patent—comes in point.

By "periphery," generally, is meant the outside or superficial part of a body. (Century Dictionary.) When applied to a sphere, it is of course the whole of the exterior surface. When applied to a disk, it means, we think, unless a larger meaning is clearly implied, the outer edge of the disk. That Motsinger had such a definition in mind, when

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he drew up his letters patent, is evidenced by the fact that his drawings show nothing else, and that there is nothing in the description that the drawings are meant to be only a preferable or alternative method. Indeed, every mechanical expedient (and they are many) utilized by Motsinger to throw his device into, and out of, engagement, is wholly inapplicable to a like purpose in appellee's device—the adjustment in one case being effected by a parallel motion of the shaft, and in the other, by a longitudinal motion.

Nor is the issue thus raised, involving the word "peripherally," an issue simply over the definition of a word; for, in the absence of a nice adjustment of the shaft to the other parts of the generator, the so-called electric field cannot be made effective; and any wearing out of the shaft, that destroys this adjustment, tends to destroy the field; so that—the Motsinger drawings and description showing an engagement of the pulleys that subject it to side pressure only, and the appellee showing end pressure only—there are presented two mechanical devices that may differ very greatly, in degree at least, as to the dangers of wear and tear likely to affect the electric field.

Considered, then, as a limited patent for a specific form of construction, we do not think the appellee infringes appellant's patent. Progress in nearly every field of mechanical activity is like the advance of the tide—the last high mark having been attained, not by a single thought thrown far in advance of the flood, but by the column of thought that the weight of the flood projects. Where one inventive mind has run far out, marking a distinct field to be thereafter covered, it is not difficult for the courts to set the stakes that give boundary to the advance. But when the advance is an item only of a similar advance all along the line—is borrowed almost altogether from the advance along the line—care must be taken that the boundaries given do not include, up and down the line, every character of mechanism that may thereafter bring about similar results. And to give to this patent, through an enlargement of the word "peripherally," the scope now urged upon us—a definition growing out of what Motsinger has since seen, rather than out of any thought in his mind when the word was first employed—would be to give to his patent a monopoly on a practice in mechanics that in principle, at least, is as old as the day that wheels were first made that peripherally operated other wheels. This, of course, we cannot do. The decree is

Affirmed.

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(149 Fed. 999.)

## TILESTON v. VAUGHAN et al.

(Circuit Court of Appeals, Seventh Circuit. October 12, 1906.)

No. 1,270.

PATENTS—INVENTION—EYE-GUARDS.

The Tileston patent, No. 513,603, for a flexible ventilated eye-guard, is void for anticipation.

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

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Appellant, grantee of letters patent No. 513,603, dated January 30, 1894, for a flexible, ventilated eye-guard, failed in his suit against appellees.

The following portions of the specification describe the device:

"My invention is to provide a flexible eye-guard that is ventilated by means employed in its construction which allows the air to circulate through the frame or portions thereof, while protecting the wearer against various annoyances, still, gives to the eye, unobstructed by frame material, full scope of vision."

"In the said drawings A represents the outer or marginal rim, constructed of longitudinal half round pieces of material or other suitable flexible material, between which or to which the edges of the ventilated flexible material, C, are held, being riveted, sewed or by other suitable means held in position. The inner rims, A', surrounding the elongated flexible centers or flexible lenses, B, may be constructed of the same material as the marginal rim, A, or of other suitable material which will hold the lenses or centers in position and to the flexible ventilated material, C. The rims may be constructed of metal, gutta percha, cloth or any suitable flexible substance, held together by rivets, a, a, a, or sewed, or by other means fastened to the ventilated portion of the frame.

"The ventilated portion of the frame holding the elongated centers or lenses may be of any perforated or porous substance which will permit the circulation of air and yet obstruct partially or entirely the passage of dust, insects or other substances liable to annoy or do injury to the wearer and I employ such material as hair cloth, wire gauze, perforated sheet metal, or other suitable flexible material.

"The lenses may be transparent or semitransparent of any flexible nature and if desired waterproof I use mica, flexible glass, or other suitable material. However it is not essential at all times to employ the use of waterproof material in which event I use veiling, wire gauze, bolting cloth or other suitable material for the centers.

"The centers or lenses are elongated to cover beyond the outer corners of the eye, thus enabling the wearer to obtain full scope for the use of the eye without necessitating turning the head.

"The eye-guard is held in position in front of the eyes by means of elastic cord or suitable fastenings attached to the sides at b or by means of the ordinary spectacle bow with fastening adapted to apply when the eye-guard should be reversed.

"Due allowance must be made in construction for the eye-guard to conform to the features of the face."

The claims which are alleged to be infringed are these:

"(1) A flexible ventilated eye-guard consisting of an outer flexible rim inclosing a flexible ventilated frame surrounding the orbital space having flexible lenses secured thereto in the manner and for the purpose substantially as described.

"(2) A flexible ventilated eye-guard consisting of an outer flexible rim inclosing a flexible ventilated inner frame surrounding the orbital space having interchangeable flexible lenses secured thereto in the manner substantially as described.

"(3) The combination in an eye-guard composed of an outer flexible rim, A, of an inner flexible ventilated frame, C, of the flexible lenses, B, and the fastenings therefor substantially as described."

Among nearly a score of prior patents in the record are No. 295,242, Genese, 1884, and No. 41,209, Everett, 1864.

Charles Turner Brown, for appellant.

Florence King, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge (after stating the facts). From the wording of the specification and claims it is quite evident that Tileston believed himself entitled to a monopoly of all forms of flexible, ventilat-

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ed eye-guards, in which appears the combination of a flexible rim, a flexible, ventilated frame, and flexible lenses.

Genese described and claimed "a flexible, air-tight, eye-guard, consisting of a frame of flexible material completely surrounding the orbital space, and having plane lenses of mica, or other transparent and flexible substance, and an elastic marginal body secured to said frame."

This Genese eye-guard is made air-tight because it is designed to guard from noxious vapors the eyes of employés in metal working and chemical manufactories; but it covers the device of the patent in suit, element for element, flexible rim, flexible frame, and flexible lenses, except that the frame is made of solid instead of perforated or porous material. In his specification Genese states that his frame is "made from thin plates of easily flexible material, such as lead or copper"; that is, the frame can be bent and will stay bent so as to secure a close contact between the rim of the guard and the face of the wearer. Appellant's counsel seeks to differentiate by asserting that the flexibility which Tileston described and claimed was the resilience which, when the bending pressure is removed, springs the material back to its original position. The contention has its basis in the ingenuity of counsel, not in the patent. Tileston's frame is made from "hair cloth, wire-gauze, perforated sheet-metal, or other suitable flexible material." So the Tileston frame is obtained by perforating the flexible sheet metal of Genese's frame. And invention cannot be predicated merely on making holes for purposes of ventilation, even if Everett and others, as early as 1864, had not shown the use of wire-gauze for the frame of eye-guards.

The decree is affirmed.

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(149 Fed. 1001.)

## CLARK et al. v. HARMON S. PALMER HOLLOW CONCRETE BLDG. BLOCK CO.

(Circuit Court of Appeals, Seventh Circuit. November 15, 1906.)

No. 1,268.

PATENTS—ANTICIPATION—DESIGN FOR BUILDING STONE.

The Palmer design patent, No. 36,806, for a design for artificial building blocks, showing the upper portion of the block having a rock face and the lower part smooth, is void for anticipation and lack of invention; it being shown without contradiction that houses still standing were built, prior to the application for the patent, of alternate layers of rock-face and smooth-face stone, presenting substantially the same appearance to the eye as a building of stone made after the design of the patent.

Appeal from the Circuit Court of the United States for the Eastern District of Illinois.

The decree appealed from enjoins appellants not to infringe a patent belonging to appellee and not to compete unfairly in trade. The patent is No. 36,806, issued on February 16, 1904, to Palmer for an ornamental design for artificial building blocks, and reads as follows:

"To All Whom It May Concern:

"Be it known that I, Harmon S. Palmer, a citizen of the United States, residing at No. 1450 Binney street northwest, in the city of Washington, District

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of Columbia, have invented a new, original, and ornamental design for artificial building blocks, as disclosed by the accompanying drawings, made a part of this specification, of which the following is a description.

"Figure 1 is a front view of the block, and Fig. 2 is a side view.

"Having thus disclosed my invention, what I claim, and desire to secure by letters patent, is—

"The ornamental design for an artificial building-block substantially as herein shown."

FIG. 1. FIG. 2."

The alleged unfair competition in trade consisted in selling the alleged infringing building blocks.

Howard G. Cook, for appellants.

Chas. J. Williamson, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge. Witnesses for appellants, whose testimony stands uncontradicted and whose veracity is unassailed, establish several instances of prior use.

In a house, built years before the patent was applied for, layers of rock-face and of smooth-face stones were alternated. If one rock-face stone lying upon a smooth-face stone be taken as a unit, the seam between them is so fine that to the eye of the ordinary observer the design is the same as if one stone were dressed partly rock-face and partly smooth-face. The smooth part in this instance was only about one-fourth of the width of the rock-face, while the patent indicates that the parts are of substantially equal width. On this ground, and for the further reason that the smooth-face and the rock-face parts were not made in one piece, it is contended that the instance in question is not an anticipation. The architect testified that there is no fixed rule respecting the comparative widths of the two layers; and the appearance to the eye would be the same, we find, whether two stones were used or only one with a line of separation marked thereon. But, if it were conceded that this instance is not sufficient as an anticipation, we are of the opinion that there was no invention in taking as a design for one piece a design that had appeared from the use of two pieces in conjunction.

The objections as to the relative widths and as to the design not appearing on one stone are met by the other instances.

Bearing in mind the familiar rule, we find no basis for the slightest doubt of the testimony concerning prior use. The witnesses said that the structures were in existence, as erected, at the time they were testifying. Owners, architects, workmen, averred that the structures were put up many years prior to the application for the patent. Ap-

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pellee offered no evidence in contradiction, and was and is content to invoke the rule of reasonable doubt. The structures speak for themselves on the question of design. Their nature and their location were such that no pretense can be made that they were erected for the purposes of this case. As to their age, the pertinent question here was not whether a particular building was erected in 1881 or in 1882, for instance, but whether the buildings were in existence prior to the alleged invention in 1904. On that we think it not unfair to conclude that the appearance of the structures convinced appellee that the testimony as to age could not be disputed. The Barb Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154, Bettendorf Patents Company v. Little Metal Wheel Company, 123 Fed. 433, 59 C. C. A. 473, and other cases in which the thing done can only be known as it is reconstructed, years afterwards, from the memory of witnesses, have no pertinency.

As to the unfair competition branch of the case, there is no evidence whatever on which to support the decree. Appellants simply sold the alleged infringing blocks as of their own make, with no attempt and no intent to palm them off as the goods of another.

The decree is reversed, with the direction to dismiss the bill for want of equity.

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(149 Fed. 1003.)

NATIONAL GLASS CO. et al. v. UNITED STATES GLASS CO. et al.

(Circuit Court of Appeals, Third Circuit. January 16, 1907.)

No. 50.

PATENTS—INFRINGEMENT—FURNACES FOR REHEATING GLASSWARE.

The Schulze-Berge patent, No. 411,131, and the Caldwell patent, No. 442,855, both for furnaces for reheating or fire-finishing glassware, as limited by construction in prior suits to the precise mechanism described, *held* not infringed by a furnace which does not have a laterally projecting floor, which is an essential feature of both.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

For opinion below, see 147 Fed. 254.

James K. Bakewell, for appellants.

M. A. Christy and George H. Christy, for appellees.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the National Glass Company and another filed a bill charging the United States Glass Company and another with infringement of patent No. 411,131, to Schulze-Berge, and No. 442,855, to Caldwell. That court, in an opinion reported at 147 Fed. 254, dismissed the bill for noninfringement. Thereupon this appeal was entered.

These patents were before this court in the case of Bryce Bros. v. National Glass Company. In an opinion reported at 116 Fed. 186, 53 C. C. A. 611, the art is so fully set forth, and the devices illustrated and so fully described, that reference to these opinions precludes the neces-



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sity of present description. Referring to both these patents it was in the last-mentioned case held by this court:

"That the inventions are not of a pioneer or primary character, and that therefore they must be confined and limited to the precise device, as described in the specifications and claims of that art."

Of the Schulze-Berge patent, here involved, it was there said:

"The essential structural peculiarity, therefore, is a furnace with a laterally projecting floor, $0^2$, of the combustion chamber, in which floor the glory holes are placed, so that a glass article may be vertically raised or lowered, in presenting it to them and withdrawing it from them."

And of the Caldwell patent:

"It will thus be seen that there is described and shown a glass furnace and combustion chamber, having the essential characteristic of that patented in No. 411,131, to wit, the laterally projecting cover, with the glory holes therein and thus accessible from below. Both require a glass-heating furnace, and both require that that furnace should be so constructed as to have a laterally projecting floor that would admit of a glory hole therein and be accessible from below."

Now, the construction thus placed on these patents, which is now the law thereof, the court below followed and applied. The respondents' device has no laterally projecting floor. Lacking this essential feature of the two patents in question, there can be no question that it does not infringe. Moreover, this laterally projecting floor made possible the use of a revolving table on which the glassware was carried through the furnace. This table is an element in all the claims of the Caldwell patent here involved, and a revolving table cannot be used in the respondents' structure. Restricting the claims, as the court below rightly did, to the limited scope awarded them by this court in the prior case, its decree was a logical sequence.

It must therefore be affirmed.

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(149 Fed. 196.)

## ROSS v. CORNELL STEAMBOAT CO.

(Circuit Court of Appeals, Third Circuit. November 2, 1906. Rehearing Denied December 31, 1906.)

No. 32.

COLLISION—TUG WITH TOW AND ANCHORED DREDGE—MUTUAL FAULTS.

A tug coming down the Hudson river at night with a long tow *held* in fault for a collision between her tow and a dredge anchored at the side of the channel in a position known to the tug, and the dredge also *held* in fault for remaining at night in a place where by reason of a bend in the river it was difficult for vessels with long tows to pass her in safety.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 79.]

Appeal from District Court of the United States for the District of New Jersey.

For opinion below, see 143 Fed. 166.

Charles D. Thompson, for P. Sanford Ross.

J. Parker Kirlin, for Cornell Steamboat Co.,

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

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PER CURIAM. These are cross-appeals from a final decree of the District Court for the District of New Jersey in a cause civil and maritime.

The libelant was the owner of a dredge, and in his libel he sought to recover damages from the respondent for a collision between the dredge, which was anchored in the Hudson river, and one or more of a string of barges in tow of the respondent's steamboat. The court below found both parties at fault, and divided the damages between them. In approving this decision, we adopt the reasoning of the learned judge upon which it is founded, as set forth in the full and satisfactory opinion filed by him and to be found in 143 Fed. 166.

The decree of the court below is affirmed.

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(150 Fed. 1.)

## FLICKINGER v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. December 5, 1906.)

No. 1,556.

1. BANKS AND BANKING—OFFENSES BY OFFICERS OF NATIONAL BANKS—INDICTMENT FOR MISAPPLICATION OF FUNDS.

In an indictment under Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], charging an officer of a national bank with a willful misapplication of its funds with intent to injure and defraud the association, it is not necessary to aver that the acts set out were done without authority from the directors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, § 973.]

2. SAME—ACTS CONSTITUTING OFFENSE.

The discounting by the president of a national bank with the funds of the bank of commercial paper known by him to be worthless or fictitious, for the benefit of an insolvent corporation of which he is an officer, and with intent to injure and defraud the bank, is a willful misapplication of its funds, constituting a criminal offense under Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497.]

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, § 964.]

3. CRIMINAL LAW—VERDICT—REPUGNANCY—SEVERAL COUNTS.

Where an indictment under Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], charging an officer of a national bank with willful misapplication of its funds, contains counts each based on the discounting of a separate instrument, and another count based on the discounting of all of such instruments, a verdict is not repugnant and inconsistent because it finds the defendant guilty on the latter count and not guilty on the former.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 2100, 2101.]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio.

T. E. Powell, for plaintiff in error.

John J. Sullivan, for the United States.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

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RICHARDS, Circuit Judge. The plaintiff in error, Edward Flickinger, was convicted of aiding and abetting Otho L. Hays, the president of the Galion National Bank, of Galion, Ohio, in certain violations of section 5209 of the Revised Statutes [U. S. Comp. St. 1901, p. 3497]. The indictment contained 52 counts, charging Hays as principal, and Flickinger as aider and abettor, with willfully misapplying the moneys, funds, and credits of the bank by certain methods described, and with unlawfully issuing certain certificates of deposit and bills of exchange without authority from the directors, all with intent to injure and defraud the bank. They were both convicted on six counts, Nos. 38, 40, 41, 42, 43, and 50, each charging a willful misapplication of the moneys, funds, and credits of the bank, with intent to injure and defraud it; the first five by discounting and passing to the credit of the Flickinger Wheel Company, at that time insolvent, certain worthless, fictitious, and fraudulent drafts, drawn by the Flickinger Wheel Company on the Vehicle Wheel Club, and accepted by the latter, and the last by discounting and passing to the credit of the Flickinger Wheel Company certain worthless and unsecured accommodation notes, given it by the Galion Wagon & Gear Company, both companies being then wholly insolvent. A motion for a new trial being overruled, the defendants were each ordered to be imprisoned for 7½ years in the penitentiary on each of the six counts; the sentence to be concurrent and not cumulative. The defendant Hays is now undergoing the punishment imposed by this sentence; the defendant Flickinger alone having prosecuted error.

The rule is well established that where a judgment of guilty is based upon several counts and the sentence is concurrent, as in this case, the judgment will be sustained if any one of the counts supporting it is found good. Claassen v. U. S., 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966. It is not our purpose, however, to select some one of these six counts, and base out affirmance upon it alone, for we think them all good. The court below overruled a demurrer to the indictment and each count thereof. It is contended it erred because the counts under consideration do not describe a willful misapplication of the funds of the bank within the inhibition of the statute, and, more particularly, do not allege that the defendant Hays did the acts charged against him without authority from the directors. The five counts charging a willful misapplication through the discount of the Vehicle Wheel Club drafts allege that the defendant Hays was, at the time the transaction took place, the president of the Galion National Bank, having general superintendence of its affairs, and that he willfully misapplied the moneys, funds, and credits of the bank, then under his control and custody as president, with intent to convert the same to the use and benefit of the Flickinger Wheel Company, and with intent to injure and defraud the bank, by discounting three drafts, one for $9,000, one for $7,500, and one for $7,500, aggregating in amount $24,000, which bear the acceptance of the Vehicle Wheel Club, by Edward Flickinger, president (describing them and giving a copy of one, the others not being obtainable)—

"Which said drafts were then and there, when so discounted, worthless, unsecured, false, and fictitious drafts and obligations, and had been drawn by

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the said the Flickinger Wheel Company upon the said Vehicle Club, at a time when the said Vehicle Wheel Club was not indebted in the sum of $24,000, nor in any other sum approximating $24,000, to the said the Flickinger Wheel Company, nor was there any consideration of any kind or value moving from the said the Flickinger Wheel Company to the said Vehicle Wheel Club, nor to any other person, for the said acceptance of the said drafts, but the same were false, fraudulent, and unauthorized; the said acceptance being indorsed upon said drafts by the said E. Flickinger, otherwise known as Edward Flickinger, who was then and there also the president of the said the Flickinger Wheel Company; the drawing and accepting of said drafts being done, and being caused to be done, by the said E. Flickinger, otherwise known as Edward Flickinger, and the said Otho L. Hays, president as aforesaid, acting together, the said Otho L. Hays being then and there the treasurer of the said the Flickinger Wheel Company, and both the making and accepting of said drafts being but a sham and a device to create a worthless and fictitious obligation, all of which he, the said Otho L. Hays, president as aforesaid, then and there well knew; the said the Flickinger Wheel Company being then and there wholly insolvent, as he, the said Otho L. Hays, president as aforesaid, then and there well knew."

The indictment then charges that the drafts were discounted by Hays by deducting the amount of interest and discount, and causing the Flickinger Wheel Company to be credited on the books with the balance of $23,469.28, which amount was afterwards withdrawn by the Flickinger Wheel Company and converted to its use. The count closes by charging that Flickinger, with intent to injure and defraud the bank, knowingly and unlawfully aided and abetted Hays in this misapplication. The other counts charging willful misapplication through the discount of other Vehicle Wheel Club drafts are similar in form.

The fiftieth count charges that Hays, being then the president of the bank and having general superintendence of its affairs, did willfully misapply its moneys, funds, and credits, then under his control and custody as president, with intent to convert the same to the use and benefit of the Flickinger Wheel company, and with the further intent to injure and defraud the bank, by receiving and discounting 12 certain notes, aggregating $15,000, which are set out in detail—

"Which said notes were then and there, when so discounted, worthless, unsecured notes and obligations, the said the Flickinger Wheel Company and the said the Galion Wagon & Gear Company both being then and there wholly insolvent and entitled to no credit in said banking association, as he, the said Otho L. Hays, president as aforesaid, then and there well knew."

It is then charged that these notes, aggregating $15,000, were discounted, and the balance, $14,419.50, was passed to the credit of the Flickinger Wheel Company, which withdrew the same from the bank and thus obtained the full use thereof, no part of it ever having been paid to the bank. The count closes by charging that Flickinger, with intent to injure and defraud the bank, knowingly and unlawfully aided and abetted Hays in this misapplication.

Section 5209 of the Revised Statutes provides that:

"Every president * * * of any association, who * * * willfully misapplies any of the moneys, funds or credits of the association, * * * with intent * * * to injure or defraud the association, * * * shall be guilty," etc.

The statute does not make it necessary, in order to constitute an offense, for the president to make the willful misapplication "without

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authority from the directors," although there is that special provision with respect to the unlawful issue of any of the notes of the association, or of any certificates of deposit or bill of exchange, etc. In passing upon the demurrer, the court below said:

"Objection is made that there is no averment that Hays discounted this paper without the knowledge and consent of the board of directors. I do not think this averment necessary, and it would not be less criminal done with the knowledge and consent of the board of directors, if the defendants and the board of directors did it under the circumstances which the indictment avers existed in connection with the action of the defendants. It appears, from the averments of these counts, that the defendant Hays misapplied money and funds of the bank by discounting these notes."

We concur in this view. The averments of these counts show, in each instance, a willful misapplication of the funds of the bank, for an unlawful purpose, with intent to injure and defraud the bank. The transaction in each case is described in detail, and the averments, covering every element of the crime, are full and clear. There could be no proper presumption that the directors, in the ordinary course of business, would consent to the discount by the president of worthless and fictitious paper, with intent to injure and defraud the bank, and therefore no necessity to insert in the indictment an averment to negative such authority. If, under any circumstances, the authority of the directors could validate such conduct on the part of the president, then, in that event, which we see no reason to anticipate, the rule laid down by this court in the McKnight Case would apply. It would be a matter of defense. McKnight v. U. S., 115 Fed. 972, 986, 54 C. C. A. 358.

But, leaving the indictment, it is argued quite strenuously, first, that the verdict of guilty on the counts mentioned is not supported by the evidence; second, that the court erred in its charge to the jury; third, that the verdict of guilty on these counts cannot be sustained, because the jury brought in a verdict of not guilty on other counts covering the same transactions, so that the verdict is repugnant and inconsistent; and, finally, that no offense was consummated, because it appears that when the amounts obtained by the discount of the drafts and notes mentioned were passed to the credit of the Flickinger Wheel Company, that company was overdrawn, so that it obtained no money from the bank, the only result being a change in the form of its obligations to the bank.

It was not necessary, in order to support the verdict, to recount the testimony. The record is long and the transactions many. In brief, the Galion National Bank was organized in 1886, and had a capital stock of $60,000. Otho L. Hays owned over one-third of its capital stock, was its president, and controlled its affairs. It closed its doors on February 15, 1904. An examination of its condition showed that its total loans and discounts at that time were $412,000. Of this amount about $337,000 had been discounted by corporations in which Edward Flickinger was the controlling spirit. The leading company was the Flickinger Wheel Company, of Galion, Ohio, a concern engaged in the manufacture and sale of vehicle wheels, of which Edward Flickinger was president and Otho L. Hays (the president of the Galion National Bank) was treasurer. Another was the Galion

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Wagon & Gear Company which, prior to June 28, 1902, when its plant burned down, had been engaged in the manufacture of vehicle bodies at Galion, Ohio. Edward Flickinger was president of this company and Otho L. Hays its treasurer. There also figures in this case what was known as the Vehicle Wheel Club, of which Edward Flickinger was president. This was a voluntary organization, composed of some 15 or 20 manufacturers of vehicle wheels, formed for the purpose of regulating prices by controlling the output.

The proof shows that the Flickinger Wheel Company did its principal banking business with the Galion National Bank from 1892 until the failure of the latter. It did a large business on insufficient capital, and was constantly in need of help from the bank. Its account was frequently heavily overdrawn. It not only discounted bona fide commercial paper, but large amounts of accommodation paper drawn to its order by the Galion Wagon & Gear Company and other corporations. Starting in 1892 with a capital stock of $60,000, afterwards increased to $100,000, it ended its business career in April, 1903, without having paid a dividend, with a total indebtedness of $637,775.34. There was proof tending to show that in the summer of 1903 the Vehicle Wheel Club agreed to and did purchase the machinery of the Flickinger Wheel Company for $66,000. There was no agreement about the manufactured stock on hand, although there was talk by individual members, speaking each for himself, of purchasing this stock in whole or in part. The drafts covered by the five counts mentioned were prepared by the cashier of the bank, acting under direction of Hays. The acceptance by the Vehicle Wheel Club was placed upon them by the use of a rubber stamp prepared by the cashier for that purpose; a blank being left for the signature of Flickinger as president. After the drafts had been prepared, Hays took them away and brought them back to the bank properly filled out, when they were discounted. This use of the Vehicle Wheel Club for "kiting" purposes was unknown to its members and wholly unauthorized. The drafts were, therefore, fictitious and fraudulent, and their discount by the president of the bank, with intent to injure and defraud the bank, was a willful misapplication of the funds under his control.

There was a general exception by the defendants "to the entire charge of the court as given relative to the Vehicle Wheel Club drafts, and each portion thereof." It would take many pages to set forth all the court said about these drafts. There is no need to do so. The claims of both sides were fairly presented, and the decision of the questions of fact involved was left to the jury. We think the evidence amply supports the conclusion which the jury must have reached in returning its verdict of guilty.

With respect to the discount of the notes aggregating $15,000, drawn by the Galion Wagon & Gear Company, and discounted on February 2, 1904, less than two weeks before the bank failed, the testimony showed that this was purely accommodation paper. At that time there was a large amount of similar paper outstanding in the bank. The Galion Wagon & Gear Company was not engaged in active business, its plant having burned down, and the proof tended to show it was insolvent. Hays, the president of the bank and the treasurer of this

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company, as well as of the Flickinger Wheel Company, stated on his direct examination that these notes were renewals, but was forced to admit later that they were not. There is nothing to show they were given for any bona fide indebtedness. It is clear they were used simply to secure more money from the bank, and at a time when (as the jury might well have found from the evidence) both companies were wholly insolvent.

The claim is made that, when the proceeds of the drafts and notes covered by these counts were passed to the credit of the Flickinger Wheel Company, that concern was overdrawn, so that no additional funds were secured from the bank. This is a mistake. On October 1, 1903, when $23,496.28, the proceeds of the discount of the Vehicle Wheel Club drafts covered by count 38 was passed to the credit of the Flickinger Wheel Company, that corporation had a balance of $12,077.13 in the bank. In addition to the discount mentioned, it was credited that day with deposits amounting to $4,998.50, making a total in the bank of $40,571.91. That day it checked out $19,644.13, leaving at the close of business to its credit $20,927.78. So it got the benefit that day of those discounts.

The other Vehicle Wheel Club drafts, covered by counts 40, 41, 42, and 43, along with two other Vehicle Wheel Club drafts, one for $6,000 and one for $5,000, were discounted and passed to the credit of the Flickinger Wheel Company on December 23, 1903. At the beginning of business on that day, the Flickinger Wheel Company was overdrawn $27,279.07. The proceeds of the discount of these six drafts amounted to $32,767.24. There were two deposits on that day, one for $1,000 and one for $3,175.61. The total deposits, therefore, amounted to $36,942.85. There was checked out on that day, $36,014.16, leaving $928.69 to apply on the overdraft of $27,279.07, which reduced it to $26,350.38. It is apparent, therefore, that on that day the Flickinger Wheel Company received the full benefit of the discount of these drafts, and the bank was left with substantially the same overdraft as before.

At the beginning of business on February 2d, the date of the discount of the Galion Wagon & Gear Company notes, aggregating $15,000, the Flickinger Wheel Company was overdrawn $12,483.87. The proceeds of these notes amounted to $14,419.50, which left the company with a balance in bank of $1,935.63. Of this balance it checked out on February 2, $780.15, and the next day again overdrew; so that, on February 2d, while it did not get the benefit of all, it did of part, of the proceeds of the discount of these notes.

The conclusion we reach with respect to this contention is that it is not supported by the facts of record. We do not need to pass upon the question of law sought to be raised, namely, whether the offense of misapplication would be complete if the proceeds of the discounts were passed to the credit of the company, and never drawn out; the worthless paper being merely substituted for the equally worthless overdrafts.

The final claim is made that the verdict of the jury is repugnant and inconsistent, because count 45, on which the jury returned a verdict of not guilty, was based on the four drafts covered by counts 40, 41, 42, and

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43, along with two others, and because counts 51 and 52, upon which there was a verdict of not guilty, covers two of the notes set forth in count 50 on which there was a verdict of guilty. An examination of the record shows that the forty-fifth count charges a misapplication of the proceeds of six Vehicle Wheel Club drafts. These six drafts were separately covered by counts 40, 41, 42, and 43, upon which there was a verdict of guilty, and by counts 39 and 44, upon which there was a verdict of not guilty. The jury very properly, therefore, found a verdict of not guilty upon the forty-fifth count. The fifty-first and fifty-second counts being based on two of the twelve notes covered by count 50, the jury quite correctly brought in a verdict of not guilty on them, since the verdict of guilty on count 50 covered all twelve notes. In doing this the jury followed the instructions of the court when it said:

"It will not be necessary for you to return verdicts of guilty both upon the counts based upon the separate instruments and the counts where all are joined in a single count."

We find nothing repugnant or inconsistent in the verdict.

Our attention is called in a general way to the refusal of the court to give the special requests presented by the defense, and to certain portions of the charge as given. The requests which were proper and pertinent were either given as requested or covered by the general charge, and counsel has not been able, in our opinion, to point out any portion of the charge excepted to at the time which was erroneous.

The judgment is affirmed.

NOTE.—The following are the opinion of Tayler, District Judge, on demurrer to the indictment, and the charge to the jury:

TAYLER, District Judge. The indictment in this case contains 52 counts. The defendants have filed a demurrer to all of the counts of the indictment, alleging different grounds, according to the character of each. All of the counts are based on section 5209 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3497]. The first, second, and third counts charge the defendant Hays, president of the Galion National Bank, with unlawfully issuing and putting forth, as such officer, a certain certificate of deposit, without the authority of the board of directors, with intent to injure and defraud the bank, and charge the defendant Flickinger with aiding and abetting Hays in the same transaction. Counts 32, 33, 34, 35, and 36 are of the same character as 1, 2, and 3, except that bills of exchange, instead of certificates of deposit, were issued.

The claim is made by the defendants that the offense is not described sufficiently, and that the averments of the several counts do not constitute a crime; and especial stress is laid upon the fact that it nowhere appears in these counts how any misapplication of funds occurred, or that the bank lost any money by reason thereof. It is sufficient to say that the allegations are in the language of the statute, and that they describe the particular act which is claimed to be unlawful. The general averment that it was done with intent to injure and defraud the bank is sufficient to complete the criminal act.

The demurrer objects to counts 11 to 16, inclusive, and to counts 37 to 45, inclusive, which relate to the discount of notes and drafts by the defendants; the notes and drafts being unsecured, and the makers and indorsers of them known to be insolvent. Objection is made that there is no averment that Hays discounted this paper without the knowledge and consent of the board of directors. I do not think this averment necessary, and it would not be less criminal, done with the knowledge and consent of the board of directors, if the defendants and the board of directors did it under the circumstances which the indictment avers existed in connection with the action of the defendants.

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It appears, from the averments of these counts, that the defendant Hays misapplied money and funds of the bank by discounting these notes. Counts 12, 13, 14, 15, 16, 46, 47, and 48 charge misappropriation by the discounting of worthless paper and placing the same to the credit of the Flickinger Wheel Company; but it is insisted that, because there is no charge that the money was withdrawn from the bank, the bank did not suffer, and no crime was committed. It may be that such an act is not criminal under section 5209, but I am constrained to believe the contrary. Such seems to be the effect of the decision of the court in Rieger v. United States, 107 Fed. 916, 47 C. C. A. 61, and reasons additional to those given by the court in that case occur to me why the criminal act is completed when a note known to be worthless is passed to the credit of a depositor. The fund is then subject to the order of the depositor, and it may or may not be withdrawn; but, until by some act of repentence on the part of the guilty official, or by some act of vigilance on the part of some other official, the credit is withdrawn, its amount remains as absolutely subject to the control of the depositor as if the credit was in all respects unimpeachable.

The objection to the remaining counts is covered by the objection made to some of the other counts—that there is no averment that the misapplication or misappropriation of the funds was done without the knowledge and consent of the association or its board of directors. On this point I have already indicated my opinion.

The demurrer is therefore overruled.

## Charge to Jury.

I feel that, as you have listened to the proceedings of the trial of this case thus far with the patience and intelligence which its importance requires, you will proceed now to the final work which you have to do in respect to it under the direction of an enlightened conscience and all the powers of mind which you possess; and in so doing I do not doubt at all but that you will arrive at a conclusion satisfactory to your judgment and to your conscience. There is no other tribunal or arbiter that you are called upon to satisfy. A conclusion which to yourself, honestly and intelligently considering the whole case, is satisfactory, is the only conclusion and the best conclusion which the law expects jurors to come to.

The indictment in this case, in 52 counts, charges that Otho L. Hays, while and as president of the Galion National Bank, of Galion, Ohio, committed certain offenses against the law of the United States, at Galion, in this division and district, between the 9th day of June, 1903, and the 13th day of February, 1904. These crimes, so charged are of varied character, and will be more fully described and commented upon as I proceed with this charge. In all of these counts, the defendant Edward Flickinger is charged with aiding and abetting Otho L. Hays in the commission of each of the offenses at the time and place stated.

Before proceeding to a more definite statement of these offenses, and of the rules by which you are to be controlled in a consideration of the facts, it will be advantageous to lay down a few general propositions which affect your determination of the questions submitted to you. You know, of course, gentlemen, that the law applicable to this case, determining the construction and effect to be put upon the facts, is given to you wholly by the court. What the facts are is to be determined by you. If it should appear, at any time during this charge, that the court seems to have an opinion as to what a fact is or what the facts are, you will understand that that apparent conclusion or state of mind of the court is not at all to weigh with you in determining what the facts are. In the federal court, the court has a right to his opinion, and he may, and sometimes does, express it, on the facts; but that does not at all exclude, nor must it interfere with, the province of the jury to determine for yourself what the facts really are.

As I have said, the defendant Otho L. Hays is charged with the commission of the several offenses, and the defendant Edward Flickinger is charged with aiding and abetting Hays in their commission. An "aider and abettor" is one who advises, counsels, procures, or encourages another to commit a crime, whether personally present or not at the time and place of the commission of

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the offense; and the defendant Flickinger would be guilty under any count of this indictment if the jury found that Hays had committed the offense charged in the count and that Flickinger had advised, counseled, procured, or encouraged Hays to commit the crime. You will observe, from this definition of aiding and abetting, that the defendant Flickinger could not be convicted of aiding and abetting Hays, if Hays himself was not guilty of committing the crime in the commission of which it is charged that Flickinger aided and abetted; and, of course, it might be that Hays was guilty of committing one of the crimes charged in the indictment, and Flickinger not guilty of aiding and abetting him. The answer to both of these questions depends wholly upon the testimony in the case. In consequence of this rule of law, defining the relations between the principal and one who aids and abets him, it may be that the language of my charge will seem to be directed chiefly to the elements that constitute the commission of the crime by the principal. So that will not mislead you.

In considering the evidence and in your endeavor to arrive at a conclusion as to the guilt or innocence of the defendants, or either of them, you will constantly bear in mind that the mere fact that an indictment has been found against them is not accompanied by any presumption whatever that they are guilty. These defendants, like all defendants in criminal cases, are presumed to be innocent until the contrary appears by proof that satisfies the jury beyond a reasonable doubt that they are guilty. This presumption of innocence, continuing with the defendants until removed by such evidence, is one of the safeguards of our jurisprudence, and is a real, and not a fanciful, right. The defendants are entitled to its protection; and you will not permit any consideration, either of public interest or otherwise, to interfere with its application to this case.

I am asked by the defendants to charge, and I do charge: The defendants are charged in the indictment with misapplying the funds of the Galion National Bank, one as principal and the other as aider and abettor, with intent to injure and defraud the bank. The law presumes the defendants innocent of any intent to defraud or injure the bank, and the burden of proving such intent beyond a reasonable doubt is upon the government, and unless it has done so the defendants must be acquitted. A reasonable doubt is not a mere possible doubt, because everything relating to human affairs, and depending upon moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after full consideration of all the evidence, leaves the minds of the jurors in such a condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. Every person is presumed to be innocent until he is proved guilty. If, upon such proof, there is a reasonable doubt remaining, the defendant is entitled to the benefit of it by acquittal. It is not sufficient to establish a probability, though a strong one, that the fact charged is more likely to be true than otherwise; but the evidence must establish the truth of the fact to a reasonable and moral certainty, a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it. To put it briefly in another form, if the evidence produced in this case be of such a convincing character that you would be unhesitatingly governed by it in the more weighty and important matters relating to your own affairs, then you may be said to have no reasonable doubt respecting the guilt or innocence of the defendants, notwithstanding the uncertainty which attends all human evidence. If, after an impartial comparison, consistent with and pointing to the guilt of the defendants, you have an abiding conviction of the defendants' guilt —such a conviction as you would be willing to act upon in the more weighty and important matters relating to your own affairs—then I say to you, you would have no reasonable doubt of their guilt.

I am also asked by the defendants to charge, and I do charge, as follows: It matters not how clearly the circumstances point to guilt, still, if they are reasonably explainable on a theory which excludes guilt, then it cannot be said that the facts in the case are sufficient to satisfy the jury beyond a reasonable doubt of the defendants' guilt; in other words, all of the facts proved must be not only consistent with and point to the guilt of the defendants, but the facts must be inconsistent with their innocence.

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I am asked by the defendants to charge, and I do charge you, as follows: If, after consideration of the whole case, any one of the jury should entertain a reasonable doubt of the guilt of the defendants, or either of them, it is the duty of such juror not to vote for a verdict of guilty as to such defendants or defendant. I give you that charge, with this additional injunction: That if, after a consideration of the whole case, fully, carefully, and honestly given, after comparison with his fellow jurors, with a view of arriving at an honest conclusion, still one of the jury should entertain a reasonable doubt of the guilt of the defendants, or either of them, it would then be the duty of such juror not to vote for a verdict of guilty.

It is proper at this point, and before we proceed to a detailed examination of the charges, and of the evidence offered by the government and the defendants, for me to say to you in a general way that evidence has been presented here of acts and declarations of both Hays and Flickinger, done and said in the absence of the other. I saw to you that, if it appears, by satisfactory proof, that a design was formed by both of these parties to co-operate, or to assist one another, in the doing of any of the illegal acts charged in the indictment, then evidence of any act done or declaration made by one of the defendants, in furtherance of the common design to do the illegal act, is competent evidence for you to consider against the other defendant. And it would follow that any act or declaration of either of the defendants after the completion of the illegal act, and not in furtherance of it, would not be competent against the other defendant. Thus, in this case, evidence has been introduced tending to prove that certain declarations were made by the defendant Flickinger a short time after the Galion National Bank had closed its doors. If such declarations were made, they cannot be considered by you as bearing upon the guilt or innocence of the defendant Hays, since they were made after the illegal act, if any there was, was done. You will apply this rule to any other acts or declarations of either of the parties to this indictment which you may find were not done or made in furtherance of the common design to do the illegal act complained of in the indictment.

Section 5209, Rev. St. [U. S. Comp. St. 1901, p. 3497], under which this indictment is drawn, provides as follows: "Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts or willfully misapplies any of the moneys, funds or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten." It will be noted that several different kinds of crimes are defined by this section. The charges made in this indictment, we find upon examination, naturally classify themselves under two heads: First, those which charge the willful misapplication of the moneys, funds, and credits of the Galion National Bank; and, second, those which charge the issuing and putting forth of a certificate of deposit and certain bills of exchange without authority from the directors. Those two branches of the law are made the subject of this indictment: The misapplication of funds; and the issuance, without authority of the directors, of a certificate of deposit and certain drafts, called in the statutes "bills of exchange."

I call your attention to the fact that the acts declared criminal by the section which I read to you a moment ago, and upon which this indictment is based, become so when done with intent to injure or defraud the banking association or some other person or corporation. In this case, the charge, in all the counts of the indictment, is that the acts were done to injure or defraud the Galion National Bank. In directing that those offenses, or the acts which constitute them, must be committed with intent to injure or defraud the bank,

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the statute does not mean that it must be made to appear that the party accused had malice or ill will toward the association. These terms, as used in the statute, mean nothing more than that the general intent to injure or defraud always arises, in contemplation of law, when one willfully or intentionally does that which is illegal or fraudulent, and which, in its necessary and natural consequences, must injure another; so that, while these offenses of issuing and putting forth a certificate of deposit, and of drawing bills of exchange, without authority of the directors, and of willful misapplication of moneys, funds and credits of the bank, must be committed by the accused with intent to injure or defraud the association, that intent may be shown, or may be conclusively presumed, from the doing of wrongful, fraudulent, and illegal acts, which, in the necessary results, naturally produce loss or injury to the association.

The law presumes that every man intends the legitimate consequences of his acts. Wrongful acts, knowingly or intentionally committed, can neither be justified nor be excused on the ground of innocent intent. The color of the act done, with knowledge of its natural and necessary results, determines the complexion of the intent. If, therefore, the moneys, funds, or credits of the Galion National Bank are shown to have been willfully misapplied, as charged in the several counts of the indictment, by the defendant Hays, as president of the bank, and if it be further shown that the defendant Flickinger aided and abetted therein, and that the said moneys, funds, and credits were converted from the use of the bank to the use of the parties named in the several counts of the indictment, whereby, as a necessary, natural, or legitimate consequence, the association's capital is reduced, or placed beyond the control of its directors, or its ability to meet its engagements or obligations or continue its business is lessened or destroyed, the intent to injure or defraud the bank must be conclusively presumed. Acts involving such consequences, when knowingly and wrongfully committed, establish the guilty intent to injure or defraud mentioned in the statute, and disclose moral turpitude utterly inconsistent with an innocent intent. And the same rule of construction should be by you applied in the consideration of the counts charging the unlawful issuing, without the authority of the directors, of the certificate of deposit and of the drafts mentioned in the indictment.

Further, in this connection, I instruct you, with reference to the terms "with intent to injure or defraud," that ordinarily the intent with which a man does a criminal act is not proclaimed by him. Ordinarily there is no direct evidence by which a jury may be satisfied, from the declarations of one charged with crime, as to what he intended when he did a certain act. The statute does not mean that it must be made to appear to the jury, by proof which convinces their minds beyond a reasonable doubt, that the defendants had malice or ill will toward the bank, or that they intended to wreck it. The intent to injure or defraud, contemplated by the statute, is not inconsistent with a deep and abiding interest on the part of the accused in the prosperity of the bank and a sincere desire for its ultimate success and welfare.

The counts charging misapplication of funds describe such misapplication, in certain forms, as follows: In counts 4, 5, 6, 7, 8, 9, 10, and 11, by discounting certain notes of the Flickinger Wheel Company for the use and benefit of, and crediting the proceeds to, the wheel company; the wheel company and the indorsers of the several notes being then and there wholly insolvent, as Hays and Flickinger then and there well knew. In counts 12, 13, 14, 15, 16, 17, and 18, by discounting certain notes of the Decatur Buggy Company for the benefit of, and crediting the proceeds to, the Flickinger Wheel Company; the wheel company and the buggy company being then and there wholly insolvent, as Hays and Flickinger well knew. In counts 46, 47, and 48, by discounting sundry notes of different concerns for the benefit of, and crediting the proceeds to, the Flickinger Wheel Company; the wheel company and the makers of the notes being then and there wholly insolvent, as Hays and Flickinger then and there well knew. In count 49, by discounting for the benefit of, and crediting the proceeds to, the Galion Wagon & Gear Company, a draft of the Galion Wagon & Gear Company; the maker and acceptor being then and there wholly insolvent, as Hays and Flickinger then and there well knew. In counts 50, 51,

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and 52, by discounting certain notes of the Gallon Wagon & Gear Company to the Flickinger Wheel Company for the benefit of, and crediting the proceeds to, the Flickinger Wheel Company; both of said companies being at the time wholly insolvent, as Hays and Flickinger then and there well knew. In counts 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, and 31 by paying out of the funds of the bank to the Decatur Buggy Company on the order of the Flickinger Wheel Company, the amounts of the several checks described in these counts; the Flickinger Wheel Company not having, at the time the checks were paid, any funds on deposit in the bank to its credit, and the Flickinger Wheel Company being then and there insolvent and entitled to no credit from said banking association, as Hays and Flickinger both then and there well knew. In counts 37, 38, 39, 40, 41, 42, 43, 44, and 45, by discounting and passing to the credit of the Flickinger Wheel Company the proceeds of certain drafts therein described, aggregating some $57,000, which drafts the indictment charges were worthless, unsecured, false, fictitious, fraudulent, and unauthorized, and that the Flickinger Wheel Company was insolvent, which facts, it is charged, were known to the defendants.

It will thus be seen that, under the general classification of the charge of misapplication of funds of the bank, several different forms of offenses are described. As respects all of these charges of misapplication, the same general rules of law are to be applied, with some additional rules respecting those misapplications included in the counts charging such misapplication by the discounting of drafts on the Vehicle Wheel Club. We will therefore first consider the rules applicable to the charges of discounting paper of the Flickinger Wheel Company, the Decatur Buggy Company, the Gallon Wagon & Gear Company, the several notes described in counts 46, 47, and 48, and the checks of the Flickinger Wheel Company to the order of the Decatur Buggy Company, drawn on the account of the Flickinger Wheel Company, and paid when the Flickinger Wheel Company had no funds to its credit, and when it is charged it was entitled to no credit and was insolvent. In order that the defendant Hays may be found guilty on any one of these counts of thus applying the funds of the bank, it must appear, by proof which satisfies you beyond a reasonable doubt, that at the time of the commission of his several acts the several concerns liable on the particular paper on account of which credit was given were insolvent, that Hays knew they were insolvent, and that he gave the credit, and thus misapplied the funds of the bank, for the purpose of injuring or defrauding the bank.

It is not a misapplication of the funds of a bank, as that term is used in the law, merely that one should give credit to an insolvent person or corporation; nor is it a misapplication of the funds of a bank for one merely to honor a check of a depositor at a time when there are no funds to the credit of the depositor. In either case, the element of an intent to injure or defraud the bank must exist; and that element does not exist if the person who does the act complained of does it in good faith, with the expectation that, in the one case the note which was discounted will be paid, or, in the other case, that the overdraft of the depositor's account will be made good. It is wholly a question of intent, and of good faith. It is impossible to look into the mind of a man, to discover what intent therein lies, or what its actual state is. We can judge only by circumstances, aided by certain rules of law which experience has shown to be just and useful; and it is my duty to say to you, in this connection, that what the intent of the defendants was in respect to these several acts, and whether or not they in good faith believed these concerns and individuals to be solvent, are questions for you to determine, as best you may, from a consideration of the facts and surrounding circumstances.

On this question of intent and good faith, many facts produced in evidence must be considered: What did Hays know about the business of the concerns involved in this indictment? What activity did he display in their business? What information came to him, growing out of their transactions with his bank? What significance is to be given to such letters or statements as he may be shown to have written or made? What influence on his conduct had his interest in the bank, as a large stockholder, on the one hand? How great was his interest in these concerns, on the other? These are circumstances which you should consider in interpreting all the evidence in the case, and es-

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pecially in respect to the subject of his knowledge and of his good faith. So, upon these counts to which I have just referred, you will consider the knowledge which the defendant Hays had, and the knowledge which the defendant Flickinger had, and if you find that honestly and in good faith they believed these concerns to be solvent, and in discounting these notes and paying these checks had no intent to injure or defraud the bank, then you should return a verdict of not guilty with respect to the counts to which I have referred.

I am asked by the defendants to charge, and I do charge, what is perhaps a mere amplification of what I have already said: The burden of proving that the defendants are guilty, under the counts of this indictment charging them with allowing an overdraft or overdrafts to the Flickinger Wheel Company, beyond a reasonable doubt, is upon the government, and it is incumbent upon the government, in order to prove the charges of allowing an overdraft or overdrafts, to prove beyond a reasonable doubt that the defendant Hays, as the president of the Galion National Bank, in so doing did not act in good faith, and that at the time of allowing such overdraft or overdrafts he did not believe, and had no reasonable grounds to believe, that the money could be repaid, and that he intended by the transaction to injure or defraud the bank, and that the defendant Flickinger aided and abetted him in so doing; and in connection with these charges you should look to all the evidence as to the condition of the account of the Flickinger Wheel Company with the Galion National Bank before and subsequent to the time of allowing these overdrafts in determining the good faith of the defendant Hays. And the general principle that runs through that charge, thus requested, is applicable upon all classes of offenses charged in this indictment.

We come now to consider the remaining counts under the general charge of misapplication of the funds of the bank, namely, those counts which refer to the drafts made by the Flickinger Wheel Company on the Vehicle Wheel Club, and accepted by the Vehicle Wheel Club, by E. Flickinger, president. The charge, in all of the counts referring to these drafts, is not only that the Flickinger Wheel Company, the drawer, was insolvent, but that the drafts themselves were fictitious, unauthorized, and fraudulent. The claim made by the government is that these drafts were drawn by the Flickinger Wheel Company, through the direct act of the defendant Flickinger, with the knowledge, approval, and contrivance of the defendant Hays, when there was no indebtedness whatever, present or expected, on the part of the Vehicle Wheel Club to the Flickinger Wheel Company; that the drafts were accepted by E. Flickinger, as president of the Vehicle Wheel Club, without any authority whatever from the club, and without any basis of obligation on the part of the club; that this was done in order to injure or defraud the bank—that is, that these large sums of money were passed to the credit of the Flickinger Wheel Company, apparently on the faith of the acceptance by the Vehicle Wheel Club of the Flickinger Wheel Company's drafts.

The defendants claim that some conversation had occurred between Flickinger and some of the members of the wheel club, whereby some understanding had been arrived at that some of the stock which the Flickinger Wheel Company had on hand would be purchased by these members of the Vehicle Wheel Club. A large number of the members of the Vehicle Wheel Club—if not all of them—have testified that the wheel club had no arrangement whatever with Flickinger for the purchase of any of the stock of the wheel company, and had entered into no contract and incurred no obligation to take it. Nor do I understand that either of the defendants claim that any such contract was made or obligation created, but that the basis of these drafts was some existing or expected indebtedness on the part of some individual member or members of the club, growing out of his purchase or agreement to purchase some of the stock of the wheel company for his own use and benefit. If this be true, then I say to you that these drafts, thus accepted and discounted for the benefit of the Flickinger Wheel Company, were, in so far as they purported to be the paper of the Vehicle Wheel Club, or paper on which that club could in any respect be held liable, fictitious, and known to be such by the defendants; and if the defendant Hays procured this fictitious paper to be thus made, and discounted it in the Galion National Bank for the benefit of the Flickinger Wheel Company, with the purpose of defrauding the bank, then I say to you

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that he would be guilty of the crime charged in the counts in which this paper is described. This would be true if the defendant Hays had no reason to believe that the Vehicle Wheel Club was itself responsible for the amount of these drafts and had authorized the acceptance of them.

Whether or not the discounting of this paper was done for the purpose of defrauding the bank depends upon the evidence in the case, and your determination of its effect in the light of the rules of law which I have already given and will now proceed to give you. If this paper was thus procured to be made in such form as to make it appear that the Vehicle Wheel Club was primarily responsible for its payment, in order to deceive the directors of the bank, or any other person who had the right to examine its securities, and if it was procured to be so made because the defendant Hays knew, or had reason to know, that, if the facts were known by persons having authority in respect to it, such paper would not be discounted for the benefit of the Flickinger Wheel Company, and injury to the bank resulted thereform, then such act would be a fraud upon the bank of such character as would make the defendant Hays guilty of the crime of misapplying the funds of the bank. And if Hays was so guilty, and the defendant Flickinger aided and abetted him in the accomplishment of this act or purpose, he (Flickinger) would be guilty, as charged in these counts of the indictment, as such aider and abettor.

Whether or not such a purpose to defraud the bank existed is to be gathered by you from all the testimony. Do the circumstances surrounding the making of these drafts indicate an honest, or a dishonest, purpose on the part of these defendants? Was this transaction carried on in the way in which it was carried on, so as to deceive the directors into the belief, if they examined the drafts, that the Vehicle Wheel Club was responsible upon them, when, in fact, it was not? Is any significance in that connection to be attached to the fact that the defendant Hays caused a rubber stamp to be made, and the impression of it printed on the face of the drafts: "Accepted. Vehicle Wheel Club, ———, Pres."? What was the purpose of this whole transaction, viewed in the light of the surrounding circumstances? It is for you to say. If it was for the purpose of defrauding the bank, then the defendants are guilty under these counts of the indictment. Irrespective of the circumstances to which I have just referred, relating to the alleged fictitious and fraudulent character of these drafts, the other propositions of law which I have laid down in respect to this general branch of the case apply; that is to say, the defendant Hays would be guilty of a misapplication of the funds of the bank, growing out of the crediting of the proceeds of these drafts on the Vehicle Wheel Club to the Flickinger Wheel Company, if, at the time the proceeds were so credited, the Flickinger Wheel Company was insolvent, and Hays knew it, and did the act of thus crediting the paper of an insolvent person with intent to defraud the bank.

I come now to the second general branch of the case, namely, to those counts of the indictment wherein it is charged that the defendant Hays, with the defendant Flickinger aiding and abetting him, issued, without authority of the board of directors, with intent to defraud the bank, first, certain drafts described in counts 32, 33, 34, 35, and 36; and, second, a certain certificate of deposit referred to in counts 1, 2, and 3. It is not the contention of the government that the defendant Hays was not authorized to issue drafts and certificates of deposit; and I say to you that, while there was no specific authority given by the board of directors to Hays to issue these obligations of the bank, yet he had authority to issue drafts and certificates of deposit. His authority in this respect arose out of the general conduct of the business of the bank; but he did not have authority to issue drafts or certificates of deposit, except in accordance with the custom of the bank, and no action of the directors could authorize him to issue drafts or certificates of deposit for the purpose of injuring or defrauding the bank.

As respects the drafts referred to in counts 32, 33, 34, 35, and 36, they were issued, four of them to the Decatur Buggy Company, and one to Elwood, who was at the time president of the Decatur Buggy Company. As to these, the defendant Hays claims that they are exactly similar transactions to those described in counts 19 to 31, inclusive, and represented the proceeds of certain commercial paper received by the Decatur Buggy Company in the usual course

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of business, and by it sent to the Flickinger Wheel Company, to be discounted in the Galion National Bank on the indorsement of the Flickinger Wheel Company for the benefit of the Decatur Buggy Company; that in the cases described in counts 19 to 31, inclusive, to which I have already referred, the proceeds of this commercial paper were passed to the credit of the Flickinger Wheel Company, and the Flickinger Wheel Company thereupon made checks to the Decatur Buggy Company for the amount of the proceeds. As I have already stated, the crime alleged in counts 19 to 31, inclusive, is based upon the payment of these checks when the Flickinger Wheel Company did not have the amount of them to its credit. As to the drafts referred to in counts 32 to 36, inclusive, they likewise represented proceeds of this commercial paper of the Decatur Buggy Company, indorsed by the Flickinger Wheel Company; but, on account of the absence of the defendant Flickinger, there was no one authorized to draw the checks of the Flickinger Wheel Company and therefore, instead of passing the proceeds of this commercial paper to the credit of the Flickinger Wheel Company, in three instances drafts on the Commercial National Bank of Cleveland, and in the other instances an order on the Galion National Bank itself, were sent directly to the Decatur Buggy Company by the defendant Hays, and in due course of business were paid out of the funds of the Galion National Bank. Now I say to you that if, at the time that Hays made these drafts, he discounted the paper of the Decatur Buggy Company in the belief that the paper was good and would be paid, then I say to you he acted in good faith and with the authority of the board of directors; for, under the custom existing in that bank, he had authority to discount such paper, and to pay to the company entitled to the proceeds the amount coming to it, either by passing such proceeds to the credit of its account, or by giving it drafts on the bank's correspondents.

Counts 1, 2 and 3 refer to a certificate of deposit for $10,000, issued under the direction of Hays on the 12th day of January, 1904, to the defendant Flickinger. The first count charges the unlawful issue, the second count charges the unlawful putting forth, and the third count charges the unlawful issuing and putting forth, of this certificate. If a crime was committed by either or both of these parties in respect to this certificate, under this indictment only one crime was committed. The three counts are put into the indictment for the purpose of charging the same offense in several different ways. If you should find, under the instructions that I have given you and am about to give you, that the defendants committed the crime of unlawfully issuing, or putting forth, or both, this certificate of deposit, you will have performed your duty if you find them guilty on any one of these three counts. I have already told you that the defendant Hays had general authority to issue certificates of deposit; that is to say, he had authority to issue certificates of deposit in the usual course of business, according to the custom of banking as carried on in that bank. But he did not have authority to issue certificates of deposit in violation of ordinary banking methods, with intent to conceal from the directors the fact that they were so issued, and with intent to injure or defraud the bank. The defendant Hays claims that this certificate of deposit was issued to the defendant Flickinger on the faith and the basis of a note for a like amount which the defendant Flickinger then and there gave to the bank, that he believed Flickinger to be solvent, that he took the note in good faith, and that, as it was a note drawing 6 per cent. interest, the same rate which the certificate drew, the proceeds of that note, which Flickinger was entitled to have passed to his credit, would be $10,000, and thus furnish a proper basis for the issuance of the certificate for that amount.

It is in evidence that for some reason this note was not entered in the discount register, that the certificate of deposit did not have the regular serial number which a certificate of deposit of that date would in the ordinary course of business have, and that the certificate of deposit was not entered on the books of the bank, according to its custom. Whether these circumstances are explained to your satisfaction is wholly a question for you to determine. The defendant insists that the purpose of issuing the certificate, on the faith of the note of Flickinger, was to provide funds with which to wipe out, to that extent, an overdraft of the Flickinger Wheel Company, then existing. The government claims that the failure to enter the note on the discount register



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of the bank, and the failure to enter the certificate of deposit on the certificate of deposit account, were a mere device whereby Hays intended to conceal from the directors of the bank, or the bank examiner, or both, the fact that such note had been taken or such certificate issued; that the certificate was intended to be used temporarily; and that, when returned, or taken care of otherwise than by the bank itself with its own funds, the Flickinger note and the certificate could be destroyed, and thus all knowledge of the existence of the transaction be obliterated.

The amount of this being $10,000, it was an amount in excess of 10 per cent. of the capital stock of the bank, and therefore illegal, but not criminal; that is to say, the law forbids the liability of any one person to the bank, for money borrowed, in excess of one-tenth of the capital stock actually paid in. Now, was this certificate of deposit issued by Hays without authority of the directors, and with intent to injure or defraud the bank? Under all the evidence bearing on this branch of the case, do you believe that Hays in good faith believed that he was authorized by the board of directors to issue a certificate of deposit for $10,000 in return for Flickinger's note of a like amount, due in six months, the certificate to be used as collateral security for Hays' note in the Sandusky bank, and the proceeds to be credited to the account of the Flickinger Wheel Company? If you believe that Hays did so believe that he had authority from the board of directors to issue such a certificate of deposit, then he would not be guilty of the offense charged in counts 1, 2, and 3 of this indictment. In answering that question, you may consider whether or not the defendant Hays then had any opinion, belief, or conviction as to what would be the action of the board of directors if this proposed transaction had been called to their attention, together with a knowledge of all of the business of these concerns of which Hays had knowledge. If Hays believed that, if the board of directors was in possession of all the information which he possessed about the Flickinger Wheel Company and the bank, they would not have consented to the issue of this certificate of deposit, then I say to you that the certificate was not issued with the authority of the board of directors; and if the natural and necessary consequence of the act of issuing it was to injure or defraud the bank, then I say to you that he would be guilty of the offense charged in counts 1, 2, and 3.

It is not absolutely required that the proof should show as to any particular count in the indictment, that the exact amount charged in such count as having been misapplied was in fact misapplied; but, if all the other elements necessary to constitute the offense are present, proof of the misapplication of less than the full amount charged is sufficient. It is your duty as jurors to try the defendants on the charges made against them in the indictment, and to determine their guilt or innocence from the testimony. You should not be moved from your duty by any sympathy, either for the defendants or for their respective families, however natural it may be for you to feel sympathy for the persons most nearly concerned with the result of your verdict. Nor should you, by any impulse to perform a public duty, be led to bring in any verdict which is not fully justified by the evidence. You will consider this case wholly without regard to the consequences of your verdict. You are here to determine this case according to the law and the evidence, and according to them alone.

I have already called your attention to the fact that counts 1, 2, and 3 refer to the same transaction, and that, if you find the defendants guilty of the crime therein charged, a verdict of guilty as to one of such counts is sufficient. So, also, you will discover, when you examine the indictment, that some of the counts duplicate the offense; that is to say, certain notes or other instruments may be separately the subject of certain counts, and later on all of the notes of a certain class may be joined in a single count of the indictment. It will not be necessary for you to return verdicts of guilty both upon the counts based upon the separate instruments and upon those based upon the instruments where all are joined in a single count.

If you should find the defendants guilty on all of the counts of the indictment, it will be sufficient for you to return a verdict that they are guilty as they stand charged in the indictment. If you find the defendant Hays only guilty on all of the counts of the indictment, then you should find a general

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verdict of guilty against Hays, and a general verdict of not guilty against Flickinger. If you find them, or either of them, guilty on some counts, and not guilty on others, you will so indicate your finding by your verdict.

As I have heretofore said, you cannot find the defendant Flickinger guilty on any count, unless you shall also find the defendant Hays guilty on the same count.

## MEMORANDUM DECISIONS.

(149 Fed. 1022.)

ALFRED H. SMITH CO. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. December 4, 1906.) No. 79 (3,956). Appeal from the Circuit Court of the United States for the Southern District of New York. For decision below, see (C. C.) 143 Fed. 691, affirming a decision of the Board of United States General Appraisers (G. A. 5,944; T. D. 26,091). Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for importer. D. Frank Lloyd, Asst. U. S. Atty. Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Decision affirmed.

(149 Fed. 1022.)

AMERICAN NEWS CO. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. November 16, 1906.) No. 77 (3,962). Appeal from the Circuit Court of the United States for the Southern District of New York. For decision below, see (C. C.) 142 Fed. 786, affirming a decision of the Board of United States General Appraisers (G. A. 5,952; T. D. 26,099). Comstock & Washburn (Albert H. Washburn, of counsel), for importer. J. Osgood Nichols, Asst. U. S. Atty. Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. Decision affirmed in open court.

(149 Fed. 1022.)

AUSTIN BALDWIN & CO. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. December 20, 1906.) No. 89 (4,013). Appeal from the Circuit Court of the United States for the Southern District of New York. For decision below, see (C. C.) 144 Fed. 702, affirming a decision of the Board of United States General Appraisers (G. A. 6,026; T. D. 26,334). Walden & Webster (Henry J. Webster, of counsel), for importers. D. Frank Lloyd, Asst. U. S. Atty. Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Decision affirmed.

(148 Fed. 1017.)

AUTOMATIC SWITCH CO. OF BALTIMORE CITY v. CUTLER-HAMMER MFG. CO. (Circuit Court of Appeals, Second Circuit. October 15, 1906.) No. 118. Appeal from the Circuit Court of the United States for the Southern District of New York. For former opinion, see 147 Fed. 250, 77 C. C. A. 176. Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. The motion to amend the mandate in this case is granted, and the mandate will be recalled and amended, so as to authorize the Circuit Court to entertain a motion to permit the Automatic Switch Company, incorporated under the laws of the state of New York, to bring its original bill in the nature of a supplemental bill, in order to revive the suit as assignee of the original complainant therein.

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(149 Fed. 1022.)

A. WIMPFHEIMER & CO. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. December 4, 1906.) No. 60 (3,006). Appeal from the Circuit Court of the United States for the Southern District of New York. For decision below, see (C. C.) 142 Fed. 849, affirming a decision of the Board of United States General Appraisers (G. A. 4,542; T. D. 21,569). Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for importers. D. Frank Lloyd, Asst. U. S. Atty. Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. We agree with the conclusion reached by the Board of General Appraisers and by the Circuit Court. The decision of the Circuit Court is therefore affirmed.

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(149 Fed. 1022.)

FRAME & CO. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. December 20, 1906.) No. 88 (4,084). Appeal from the Circuit Court of the United States for the Southern District of New York. For decision below, see (C. C.) 143 Fed. 692, affirming a decision of the Board of United States General Appraisers (G. A. 6,045; T. D. 26,374). Walden & Webster (Henry J. Webster, of counsel), for importers. D. Frank Lloyd, Asst. U. S. Atty. Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. Decision affirmed.

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(148 Fed. 1018.)

GASTONIA COTTON MFG. CO. v. W. L. WELLS CO. (Circuit Court of Appeals, Fourth Circuit. November 8, 1906.) No. 469. In Error to the Circuit Court of the United States for the Western District of North Carolina. O. F. Mason, A. Burwell, and Edwin T. Cansler, for plaintiff in error. Murray F. Smith, J. Hirsh, and C. W. Tillett, for defendant in error. Before GOFF and PRITCHARD, Circuit Judges, and WADDILL, District Judge.

GOFF, Circuit Judge. This case was remanded to this court by the Supreme Court of the United States, with directions to set aside the judgment theretofore rendered in this cause, and to proceed further touching the merits as may be consistent with law and with the opinion of said court. 198 U. S. 177, 25 Sup. Ct. 640, 49 L. Ed. 1003. For the proceedings heretofore had in this court concerning this case, see 128 Fed. 369, 63 C. C. A. 111. For the opinion of the court below, see 118 Fed. 190, in which the case is most fully and clearly stated. We consider it unnecessary to again set forth the facts involved in this litigation. The only question remaining for this court to dispose of is the action of the court below in directing a verdict for the appellee. The plaintiff in error contends that said court erred in withdrawing the consideration of the case from the jury and directing a verdict for the plaintiff below. The insistence is that the evidence more than reasonably tended to establish the plea of payment, and that the jury should have been permitted to pass upon it. The plaintiff in error claims that before the suit was instituted it paid $50,000 of its indebtedness to defendant in error, by and through one John F. Love, the secretary and treasurer of the two companies—the Gastonia Cotton Manufacturing Company and the Avon Mills. Such payment is said to have been made to a corporation known as the "Loray Mills," for stock in that mill subscribed for by the W. L. Wells Company, acting by and through W. L. Wells. The transaction referred to is fully described by Judge Boyd in his opinion. Plaintiff in error claims the evidence shows that, acting through Love, it, under the direction of said W. L. Wells, paid at one time $10,000 of its indebtedness to defendant in error, by applying that sum on the purchase of the stock so subscribed, and that at another time it applied the sum of $40,000 for like purposes. So far as the last-mentioned sum is concerned, there is no evidence that it was so applied with the knowledge of, or by the authority of, the W. L. Wells Company. In fact the testimony relating to that transaction tends to prove that what took place between Love and W. L. Wells was carefully concealed from the W. L. Wells Company, and there

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is no evidence from which the ratification of that company concerning said matter can be inferred. The view of the court below regarding it has our approval. The claim for credit so far as the item of $10,000 is concerned is quite different; for the testimony tends to show that Love gave the W. L. Wells Company notice in August, 1900, that $10,000 due it for cotton sold during the season of 1899–1900 had been applied to the payment of Loray stock; that John T. Wells admitted that such notice was received and filed among the papers of the company, and that from the date of such receipt until in August, 1901, no demand was made by him, or by any one else, for the W. L. Wells Company, upon the defendants below for said amount; that thereafter, in December, 1900, a settlement was made by defendant below for all cotton shipped it to that date, invoices of which were marked paid by the W. L. Wells Company; that from December 18, 1900, to January 31, 1901, the W. L. Wells Company made several demands upon defendant below for payments on account of cotton shipped in the months of November and December, 1900, without reference to former shipments. Therefore, so far as the item of $10,000, is concerned, there was testimony strongly tending to support the contention of the defendants below, and it should, we think, have been submitted to the jury. This error will necessitate the reversal of the judgment rendered, and the granting of a new trial, unless the defendant in error will enter in the court below a remittitur covering the said claim for credit of $10,000.

It appears by the record that the court below, with the consent of parties, consolidated this case with the case of the same plaintiff against the Avon Mills, for the purpose of more conveniently trying the issue before the jury; it being provided in the court's order that a separate verdict and judgment should be entered in each case. It is further disclosed that, after the trial had been concluded, it was stipulated by the parties that this writ of error should be prosecuted, with the understanding that the judgment in the Avon Mills Case should abide the decision of the appellate court concerning the questions raised by the record now before us. We conclude that this case shall be remanded to the court below, with direction to set aside the judgment complained of, also the verdict, and award a new trial, unless the defendant in error files, within 20 days after the mandate of this court shall have reached the court below, a remittitur as to said sum of $10,000, apportioned as follows: $5,901.38, to be credited as of June 9, 1902, on the judgment rendered in this case, and $4,098.62, as of said date, on the judgment against the Avon Mills. In case said remittitur is filed, then the judgment rendered below will stand affirmed. If it is not so filed, then the court below will enter an order setting aside said judgment and awarding a venire facias de novo. Modified and affirmed.

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(148 Fed. 1019.)

J. A. SCRIVEN CO. v. GIRARD CO. (Circuit Court of Appeals, Second Circuit. November 19, 1906.) No. 23. Appeal from the Circuit Court of the United States for the Southern District of New York. On appeal from an order of the Circuit Court for the Southern District of New York, dated October 2, 1905, granting an injunction pendente lite. For opinion below, see 140 Fed. 794. Louis Marshall, for appellant. A. von Briesen, for appellee. Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Upon full consideration of the facts appearing in the record we are of the opinion that the order of the Circuit Court should be amended so as to read as follows: "Ordered, that until the further order of this court the said defendant Girard Company, its officers, directors, trustees, managers, servants, agents, attorneys and workmen, and each and every of them, be, and they hereby are, restrained and enjoined from directly or indirectly making use of the words 'Elastic Seam' or 'Stretchiseam' in the construction, manufacture, sale, delivery, working, operation or use, offering for sale, or advertising men's drawers with a longitudinal yellow strip down the sides, or down the sides and back, of said drawers. And it is further ordered, that the said defendant Girard Company, its officers, directors, trustees, managers, servants, agents, attorneys, and workmen, and each and every of

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them, be, and they are hereby, restrained and enjoined from using said words 'Elastic Seam' or 'Stretchiseam' in connection with men's drawers containing strips of elastic material, white, gray, or other color, unless accompanied by a statement conspicuously, clearly, and unmistakably specifying that such drawers are the product of the Girard Company, and are not the product of the Scriven Company." The order, as so modified, is affirmed.

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(149 Fed. 1023.)

JUNG YUEN v. UNITED STATES. (Circuit Court of Appeals, Sixth Circuit. October 13, 1906.) No. 1,534. Appeal from the District Court of the United States for the Northern District of Ohio. F. R. Marvin, for appellant. John J. Sullivan, for the United States.

PER CURIAM. In this cause only a question of fact is controverted, which is whether this appellant was a "laborer" before the passage of the acts of 1892 and 1893 relating to the deportation of Chinese persons illegally in this country, within the intent and meaning of those acts. Differing from the conclusion of the district judge, we think it sufficiently proven that he was a resident of the United States before that time and was not then a "laborer." The order of deportation is reversed, with directions to discharge the respondent, who is the appellant here.

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(148 Fed. 1019.)

KESSLER et al. v. ENSLEY LAND CO. et al. (Circuit Court of Appeals, Fifth Circuit. December 13, 1906.) No. 1,556. Appeal from the Circuit Court of the United States for the Northern District of Alabama. For opinion below, see 141 Fed. 130. J. A. W. Smith, Wm. A. Gunter, and Thomas M. Steeger, for appellants. Jno. B. Knox and E. J. Smyer, for appellees. Before PARDEE and SHELBY, Circuit Judges, and MEEK, District Judge.

PER CURIAM. The matters complained of in the bill were intra vires the Ensley Land Company, and as the record shows that a majority of the directors and stockholders, at the time of bringing the suit, were not interested adversely to the company, the right of the complainants, as stockholders, to bring and maintain this suit, is doubtful. If the complainants can bring and maintain the bill, in prosecuting the same they can only assert the rights and equities which the company itself, if willing to sue, could assert, and any defense good against the Ensley Land Company is good against the complainants. Four years, during which the defendants, the Ensley Company and others, were exploiting the lands in controversy, elapsed before the suit was brought, and we fail to find sufficient evidence to meet the charge of laches. On the facts of the case made in the transcript, we concur with the learned judge whose exhaustive opinion is found in the record. The decree appealed from is affirmed.

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(148 Fed. 1020.)

OLD DOMINION COPPER MINING & SMELTING CO. v. LEWISOHN et al. (Circuit Court of Appeals, Second Circuit. December 4, 1906.) No. 64. Appeal from the Circuit Court of the United States for the Southern District of New York. On appeal from a decree of the Circuit Court for the Southern District of New York sustaining a demurrer to an amended bill of complaint and dismissing the bill for want of equity. The opinion of the Circuit Court sustaining the demurrer to the original bill is reported in 136 Fed. 915. The court held upon the hearing of the demurrer to the amended bill that there was no substantial difference between it and the original bill, and followed the former decision. Final decree was thereupon entered, and the complainant appeals. The facts sufficiently appear in the opinion of the Circuit Court sustaining the demurrer to the original bill (136 Fed. 915), and are stated in full in Old Dominion C. M. & S. Co. v. Bigelow, 188 Mass. 315, 74 N. E. 653, 108 Am. St. Rep. 479. Louis Brandeis, for appellant. Eugene

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Treadwell, for appellees. Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The bill prays for relief as follows: First, that the sale of the mining claims to the complainant by Leonard Lewisohn, the defendants' testator, and Albert S. Bigelow, a citizen of Massachusetts and not a party to this action, be rescinded, and the real estate reconveyed to the defendants, upon receipt by the complainant of the consideration paid therefor; second, that defendants return to the complainant the consideration paid by complainant for said property, namely, 30,000 shares of its capital stock, or account therefor; third, that, if the court shall decide that the complainant is not entitled to rescind the sale of said real estate to it, then and in that event that the court ascertain the amount of damages sustained by complainant and direct the defendants, as executors, to pay the amount to complainant. We are unable to perceive how this relief, or any part thereof, can be granted the complainant upon the facts alleged in the bill. The fundamental difficulty with the bill is that it fails to state any facts showing that the complainant was in any way injured or defrauded by the transactions complained of. At the time of the transfer by Bigelow and Lewisohn to the company, Bigelow and Lewisohn and their representatives owned the entire issue of stock of the corporation. The sale by them to the corporation was in effect a sale by them to Bigelow and Lewisohn. A corporation can only act through the human beings who compose it. It cannot be deceived or defrauded, unless its stockholders and directors are deceived or defrauded. The corporation knew all that Bigelow and Lewisohn knew, and no one of the original parties to the transfer was defrauded by the exchange of the stock controlled by Bigelow and Lewisohn for the real estate controlled by them. It may be that such a large overcapitalization as is alleged in the bill might mislead and deceive careless and credulous purchasers of the stock; but we are not now dealing with the case of a stockholder alleging concealment, fraud, and misrepresentation. The stockholders, apparently, have no complaint. At least they have not propounded any. Indeed, it is not easy to see how a purchaser, who paid $25 per share, could be defrauded, in view of the allegation of the bill that "the shares of this corporation so issued in payment for the property sold to it as aforesaid were at the time of the fair market value of twenty-five (25) dollars each, and continued for a long time thereafter to be of such or greater value." It is enough, however, that this is not a stockholders' action. The subscribers for the 20,000 shares subsequently issued were not deceived. They asked for no statement, and received none. They got what they purchased, and are not complainants here. A protracted discussion is unnecessary, for the reason that this court and the Circuit Court of the Southern District have decided the question adversely to the complainant's contention. Foster v. Seymour (C. C.) 23 Fed. 65; McCracken v. Robison, 57 Fed. 375, 6 C. C. A. 400. To the same effect are the decisions of the New York Court of Appeals. Barr v. N. Y., L. E. & W. R. Co., 125 N. Y. 263, 26 N. E. 145; Blum v. Whitney, 185 N. Y. 232, 77 N. E. 1159. It is true that the Supreme Court of Massachusetts (188 Mass. 315, 74 N. E. 653, 108 Am. St. Rep. 478) has taken a different view, but we feel constrained to adhere to the prior adjudication of this circuit. The decree is affirmed, with costs.

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(148 Fed. 1021.)

REGINA CO. v. NEW CENTURY MUSIC BOX CO. (Circuit Court of Appeals, Second Circuit. November 7, 1906.) No. 31. Appeal from the Circuit Court of the United States for the Southern District of New York. On appeal from a decree of the Circuit Court for the Southern District of New York adjudging invalid the complainant's patent, No. 500,371, for an improvement in music boxes. The opinion of Judge Ray in the Circuit Court is reported in 138 Fed. 903. Arthur von Briesen, for appellant. Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The Circuit Court found that the patent was invalid for lack of invention, and, after an examination of the record, we see no reason to disturb this finding. The important element of the combination of the

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claims, and the one which produced a real advance in the art, was the transfer of power from the center to the periphery of the moving disk by means of the sprocket-wheel engaging in the apertures near the outer edge of the disk; but this was not new with the patentees. The other elements of the combination are old, and the combination itself, speaking broadly, is old, being differentiated from the prior art by the introduction of the hinged rod, with anti-friction wheels thereon, as a substitute for the devices of the prior art used to produce similar results. This may be an improvement over the means previously adopted for giving uniform pressure to the disk; but in view of the prior art, as disclosed by the record, and in view of the very obvious use of anti-friction wheels in such environments, we are of the opinion that the adoption of the hinged rod of the patent did not involve invention. It was the work of a mechanic familiar with the requirements of the art, and not of an inventor. The decree is affirmed.

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(148 Fed. 1021.)

SNYDER et al. v. HOME INS. CO. (Circuit Court of Appeals, Second Circuit. October 18, 1906.) No. 18. Appeal from the District Court of the United States for the Southern District of New York. John F. Foley, for appellants. Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. Decree (133 Fed. 848) affirmed in open court.

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(148 Fed. 1021.)

SOUTHERN RY. CO. et al. v. TIFT et al. (Circuit Court of Appeals, Fifth Circuit. December 15, 1906.) No. 1,495. Appeal from the Circuit Court of the United States, Southern District of Georgia. For opinion below, see 138 Fed. 753. Ed Baxter, for appellants. W. D. Ellis and W. A. Wimbish, for appellees. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. A majority of the judges being of opinion that this case was correctly ruled and decided in the Circuit Court, the decree of that court is affirmed.

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(148 Fed. 1022.)

VICTOR TALKING MACH. CO. et al. v. LEEDS & CATLIN CO. SAME v. TALK-O-PHONE CO. (Circuit Court of Appeals, Second Circuit. October 12, 1906.) Nos. 166, 167. Appeals from the Circuit Court of the United States for the Southern District of New York. For opinion below, see 146 Fed. 534. Louis Hicks, for appellants. Horace Pettitt, for appellees. Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. Orders affirmed in open court.

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(148 Fed. 1022.)

WERCKMEISTER v. AMERICAN LITHOGRAPHIC CO. et al. (Circuit Court of Appeals, Second Circuit. December 11, 1906) No. 102. Appeal from the Circuit Court of the United States for the Southern District of New York. For opinion below, see 138 Fed. 162. Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. Affirmed in open court.

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but is not sustained by the evidence; the practice in admiralty being to bring all parties before the court, and to determine the controversy on the merits as it appears from the proof, regardless of technicalities of pleading.
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**§ 1. Decisions reviewable.**

Defendant filed a general demurrer to plaintiff's statement or declaration, which demurrer was sustained with leave to the plaintiff "to discontinue on payment of costs," but it did not appear that there had ever been a discontinuance, or that defendant had ever entered judgment against plaintiff prior to the suing out of the writ of error. *Held*, that the order was not such a final judgment as would support the writ.

—Morris v. Dunbar, 149 Fed. 406.....79 C. C. A. 226

No writ of error will lie at the suit of a plaintiff to review a judgment of nonsuit or dismissal rendered in a national court at his request or with his consent. Such a judgment, however, rendered on the motion of the defendant and against the objection and the protest of the plaintiff is reviewable at the latter's instance.

—Francisco v. Chicago & A. R. Co., 149 Fed. 354.....79 C. C. A. 292

At the close of a trial the defendant moved the court to instruct the jury to return a verdict in its favor, and its motion was granted. But before the instruction was given the plaintiff asked, and was granted, leave by the court to take an involuntary nonsuit, and a judgment was rendered accordingly. *Held*, the nonsuit was entered with the consent and at the request of the plaintiff, and no writ of error could be maintained at his suit to review it. Describing it by a false epithet did not change its character.

—Francisco v. Chicago & A. R. Co., 149 Fed. 354.....79 C. C. A. 292

**§ 2. Presentation and reservation in lower court of grounds of review.**

An exception to a charge, in order to found a right to review, must be sufficiently distinct and specific to direct the attention of the court to the particular error which is the subject of complaint.

—Coney Island Co. v. Dennan, 149 Fed. 687.....79 C. C. A. 375

A defendant who contests a case on the merits without objection to the evidence offered on the ground of a variance, which might have been cured by an amendment of the pleadings, cannot assign such variance as a ground for reversal in an Appellate Court.

—Thompson-Starrett Co. v. Fitzgerald, 149 Fed. 721..79 C. C. A. 427

**§ 3. Parties.**

Where two members of a firm were jointly sued on a firm debt and judgment was entered against both, a writ of error could not be maintained by one of them alone in the absence of summons, severance, or a sufficient showing for nonjoinder of the other.

—Port v. Schloss Bros. & Co., 149 Fed. 731.....79 C. C. A. 437

**§ 4. Assignment of errors.**

A Circuit Court of Appeals may dismiss an appeal where the appellant fails to comply with rules 11 and 24 of the court (90 Fed. cxlvi, clxiv, 31 C. C. A. cxlvi, clxiv) respecting assignments of error.

—Moline Trust & Savings Bank v. Wylie, 149 Fed. 734.....
79 C. C. A. 440

**§ 5. Briefs.**

A Circuit Court of Appeals may dismiss an appeal where the appellant fails to comply with rules 11 and 24 of the court (90 Fed. cxlvi, clxiv, 31 C. C. A. cxlvi, clxiv) respecting briefs.

—Moline Trust & Savings Bank v. Wylie, 149 Fed. 734.....
79 C. C. A. 440

**§ 6. Hearing and rehearing.**

The rule of the Circuit Court of Appeals which requires a petition for rehearing to be filed within 30 days after the filing of an opinion is one of

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convenience, and should not be enforced where the point on which a rehearing is asked is a reversal of the authority upon which the decision was based after the time for filing of the petition had expired, but before the court had lost jurisdiction over the judgment by the expiration of the term.
—Unitype Co. v. Long, 149 Fed. 196.....79 C. C. A. 154

**§ 7. Review.**
Where, in an action on a note, the jury found in plaintiff's favor on an issue as to alleged misrepresentations, plaintiffs sustained no injury by the submission of such issue to the jury.
—Rockefeller v. Wedge, 149 Fed. 130.....79 C. C. A. 26

In a case brought to the Circuit Court of Appeals, on appeal from the judgment of the trial court after a hearing of the case on the merits, and not on exceptions to the findings of a master, the appellate court was entitled to review the case independent of the master's findings.
—Merchants' Nat. Bank of Toledo, Ohio, v. Cole, 149 Fed. 708.....
79 C. C. A. 414

**§ 8. Determination and disposition of cause.**
Where the mandate on a former appeal provided that appellants were liable for a sum sufficient to "pay all debts of every class which had or might be proved against the bankrupt, and the expenses of the trustee, his fee, and costs," provided the aggregate did not exceed the amount of the preference received by appellants' testator, appellants were properly charged with a reasonable counsel fee to the trustee's attorney.
—Page v. Rogers, 149 Fed. 194.....79 C. C. A. 153

## APPLIANCES.

Liability of employer for defects, see "Master and Servant," § 1.

## APPORTIONMENT.

Of salvage compensation, see "Salvage," § 2.

## ARGUMENT OF COUNSEL.

In criminal prosecutions, see "Criminal Law," § 4.

## ARREST OF JUDGMENT.

In criminal prosecutions, see "Criminal Law," § 5.

## ARSON.

Incendiarism as defense to action on insurance policy, see "Insurance," § 3.

## ASSESSMENT.

Of compensation for property taken for public use, see "Eminent Domain," § 1.

## ASSIGNMENT OF ERRORS.

See "Appeal and Error," § 4; "Criminal Law," § 6.

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## ASSIGNMENTS.

In bankruptcy, see "Bankruptcy," § 2.
Of patents, see "Patents," § 4.

## ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See "Bankruptcy."

## ASSUMPTION.

Of risk by employé, see "Master and Servant," § 1.

## ATTENDANCE.

Of juror, see "Jury," § 1.

## ATTORNEY AND CLIENT.

Argument and conduct of counsel at trial in criminal prosecutions, see "Criminal Law," § 4.
Attorneys' fees as claim against estate of bankrupt, see "Bankruptcy," § 6.
Attorneys' fees in action by or against bankrupt, see "Bankruptcy," § 5.
Attorneys in fact, see "Principal and Agent."

## BAILMENT.

See "Banks and Banking," § 1; "Carriers," § 2.
Distinguished from sale to bankrupt, see "Bankruptcy," § 2.

## BANKRUPTCY.

Collateral attack on adjudication in bankruptcy, see "Judgment," § 2.
Mandate on appeal in action involving estate of bankrupt, see "Appeal and Error," § 8.
Privilege of bankrupt as witness, see "Witnesses," § 1.

**§ 1. Petition, adjudication, warrant, and custody of property.**

A natural person may be adjudged an involuntary bankrupt, although he is not "engaged principally in manufacturing, trading, printing, publishing or mercantile pursuits." The quoted clause qualifies "any corporation" only. U. S. Comp. St. 1901, p. 3423, § 4b, 30 Stat. 547, c. 541, § 4b.
—Cleage v. Laidley, 149 Fed. 346.....79 C. C. A. 284

Where a petition of creditors to have a debtor declared a bankrupt failed to aver that the debtor was not a wage earner or a person engaged chiefly in farming or in tilling the soil, as required by Bankr. Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], as amended (section 4), the petition was demurrable and insufficient to sustain an adjudication if timely objection was made thereto.
—Edelstein v. United States, 149 Fed. 636.....79 C. C. A. 328

Decedent on March 23, 1898, executed a guaranty of payment of all her sons' notes to a bank and all renewals and new loans made by the bank to them. Decedent was a woman of advanced years, without special business experience. The bank then extended further credit to the sons, and during the five succeeding years they took care of their paper

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as it matured; it appearing that over $250,000 of their paper was discounted by the bank during that period. On September 2, 1903, decedent owned no personal property, except household goods, but owned real estate of considerable value, and had no creditor, except N., to whom she owed a large sum, other than her indebtedness on the guaranty, and on that day she conveyed her real estate to N. in payment of her indebtedness to him. At the time of this conveyance none of the outstanding notes discounted by the bank for her sons, had matured, and it did not appear that she had any knowledge of her liability on the guaranty. *Held*, it was not shown that the conveyance to N. was made with intent to hinder, delay, and defraud her creditors, or with intent to prefer N. over her other creditors, so as to constitute an act of bankruptcy.

—Merchants' Nat. Bank of Toledo, Ohio, v. Cole, 149 Fed. 708..... 79 C. C. A. 414

Within four months preceding the filing of a bankruptcy petition H. & Co. purchased a stock of goods for $3,000, paying $100 in cash and giving notes for the remainder. At the same time they gave a chattel mortgage on the goods so purchased to secure the payment of the notes, which mortgage covered all additions to the stock and all stocks that might thereafter be consolidated with it. Immediately after the purchase and execution of the mortgage H. & Co. consolidated such stock, which was worth the price agreed to be paid for it, with that which they had previously owned, acting in good faith and in accordance with the previous intention to unite the two stocks, so that the mortgage should cover both. *Held*, that the execution of such mortgage did not constitute an act of bankruptcy.

—Martin v. Hulen & Co., 149 Fed. 982.....79 C. C. A. 492

**§ 2. Assignment, administration, and distribution of bankrupt's estate —Assignment and title, rights, and remedies of trustee in general.**

At the time of a bankrupt's adjudication, certain of her real estate had been advertised for sale under an order of the state court, and was purchased at the sheriff's sale by F., who immediately leased the farm for $1,200 for the succeeding year. The sheriff's sale was not confirmed, and the land was finally sold by the bankrupt's trustees. On the appointment of the trustees F. turned over to them the tenant's note for the year's rent, and they ratified the lease, after which the tenant paid the note and raised a crop on the land of the value of $8,000. *Held*, that the trustees, after obtaining control of the land, properly ratified such lease as against the rights of the bankrupt.

—In re Throckmorton, 149 Fed. 145.....79 C. C. A. 15

Where, prior to the institution of proceedings in bankruptcy, the highest court of the state in which certain land belonging to the bankrupt was located, had held that W. had acquired title to an undivided one-fifth interest therein on foreclosure of a lien for attorney's fees, and the court in such action had jurisdiction both of the parties and subject-matter, such adjudication could not be collaterally attacked in the bankruptcy proceedings, and the trustees in bankruptcy therefore properly recognized W.'s interest in the land.

—In re Throckmorton, 149 Fed. 145.....79 C. C. A. 15

Pianos were shipped to a corporation dealing in musical instruments, which subsequently became a bankrupt, under a written contract stating that they were furnished on memorandum, also the price of each kind, and providing that the bankrupt should "pay for every piano they sell, cash." When pianos were furnished under the contract, invoices were sent containing a recital that the shipper sold the pianos described to the bankrupt, and shortly before bankruptcy proceedings were instituted the shipper wrote the bankrupt, stating that, when the pianos were consigned, it was with the understanding that they should be settled for as sold and paid for in cash when sold, that the shipper insisted on a settle-

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ment, and that, if it was not convenient to send cash, the shipper would accept paper secured by the collateral, but "did not care for dead stock." *Held*, that the transaction was a bailment, and not a sale; and that the title to the unsold pianos never passed to the bankrupt.

—In re Smith & Nixon Piano Co., 149 Fed. 111.....79 C. C. A. 53

A deposit of securities with a stockbroker by a customer as margin, and as security against losses in stock transactions, under an agreement which does not contemplate a sale or disposition of such securities by the broker except in the event of losses, constitutes a pledge, and does not create the relation of debtor and creditor, and where the securities have not been sold by the broker to meet marginal requirements prior to his bankruptcy, they may be recovered by the pledgor from the bankrupt's trustee.

—In re Jacob Berry & Co., 149 Fed. 176.....79 C. C. A. 124

**§ 3. —— Preferences and transfers by bankrupt, and attachments and other liens.**

A duly recorded chattel mortgage on after-acquired property under the law of Ohio is valid as between the parties, and becomes a valid lien as of its date as against the mortgagor's general creditors when the property is taken into possession by the mortgagee. Hence such taking possession within four months prior to the mortgagor's bankruptcy does not create a lien nor operate as a preferential transfer within Bankr. Act 1898, § 60a, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], as amended in 1903 (32 Stat. 799, c. 487 [U. S. Comp. St. Supp. 1905, p. 689]).

—Fisher v. Zollinger, 149 Fed. 54.....79 C. C. A. 76

Under the law of Ohio relating to chattel mortgages, which governs as to their validity and the rights of the mortgagee in bankruptcy proceedings in that state, a duly recorded mortgage given by a manufacturing corporation to secure bonds, which covers its stock in trade and provides that it may retain possession and sell any of the property in the usual course of its business and use the proceeds until default, is valid as between the parties, and when the mortgagee takes possession, either with the mortgagor's consent or under authority contained in the mortgage, his title becomes complete as against general creditors of the mortgagor; and where such a mortgage was given more than four months prior to the bankruptcy of the mortgagor the taking of possession by the mortgagee within such four months with the consent of the mortgagor and as authorized by the terms of the mortgage, although with knowledge of the mortgagor's insolvency, does not constitute a transfer or preference under Bankr. Act 1898, § 60a, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], as amended in 1903 (32 Stat. 799, c. 487 [U. S. Comp. St. Supp. 1905, p. 689]), since the lien so perfected by the taking of possession relates back to the date of the mortgage.

—Fisher v. Zollinger, 149 Fed. 54.....79 C. C. A. 76

The failure to record a chattel mortgage under the provisions of Rev. St. Tex. 1895, art. 3328, which, under the state decisions, does not affect its validity as between the parties or as against general creditors, does not render it invalid as against the trustee in bankruptcy of the mortgagor by virtue of Bankr. Act July 1, 1898, c. 541, § 67a, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449].

—E. Eppstein & Co. v. Wilson, 149 Fed. 197.....79 C. C. A. 155

Proof that one had property of the value of only about $50 and that he owed more than $25,000 in July, and that he paid no part of this indebtedness during the succeeding four months, is sufficient evidence that he was insolvent in the following October and December. A condition of insolvency is presumed to continue as long as such conditions usually continue under similar circumstances.

—Cleage v. Laidley, 149 Fed. 346.....79 C. C. A. 284

Before the filing of an involuntary petition, claimant instituted suit in a state court to recover specific personal property alleged to have been purchased by the bankrupt by fraudulent representations, and

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obtained a writ of sequestration under which the property was seized. Bankruptcy proceedings were then instituted, and the trustee, by leave of the state court, intervened and unsuccessfully defended the suit, in which claimant recovered judgment for the return of the property. *Held*, that the state court's jurisdiction was not lost or in any way affected by the filing of the bankruptcy petition, or by the subsequent adjudication that the buyer was a bankrupt, and that, so far as the property or its proceeds were concerned, the judgment was conclusive on the trustee as a person acquiring an interest pendente lite, though he was not a necessary party.

—Linstroth Wagon Co. v. Ballew, 149 Fed. 960.....79 C. C. A. 470

**§ 4. —— Administration of estate.**

When certain of the bankrupt's real estate was offered for sale, she offered to bid $10,500, but, being unable to deposit $1,000 earnest money or pay the amount of her bid, the auctioneer did not receive or cry her bid, and finally sold the property to another for $10,354. *Held*, that such sale was properly confirmed nearly a month thereafter; the bankrupt having taken no steps in the meantime to make good her bid.

—In re Throckmorton, 149 Fed. 145.....79 C. C. A. 15

Where land in which a bankrupt owned an undivided four-fifths interest was appraised at $6,000, and the bankrupt's interest was sold for $4,600, the price was not so inadequate as to entitle the bankrupt to have the sale set aside.

—In re Throckmorton, 149 Fed. 145.....79 C. C. A. 15

**§ 5. —— Actions by or against trustee.**

Prior to a bankrupt's adjudication, she had contracted to exchange certain land free from incumbrances for 40 city lots. When the bankruptcy adjudication was made, the bankrupt's land was incumbered by a mortgage for $12,000 and a judgment lien for the services of an attorney. The owner of the lots refused to make the exchange, and the bankrupt had sued him to compel specific performance, in which he had answered that he owned more than the 40 lots in question, and that the contract did not specify which 40 he was to convey. *Held* that, a demurrer to such defense having been overruled, the trustees properly refused to prosecute the suit further.

—In re Throckmorton, 149 Fed. 145.....79 C. C. A. 15

Executors were held liable to repay to a bankrupt's trustee, of an alleged preference, a sum sufficient to pay all debts of every class proved against the bankrupt, and the expenses of the trustee, his fee, and costs. A fee of $15,000 was allowed to the trustee's attorney, but the executors' total liability was more than $7,000 less than the aggregate of the debts and expenses, including the allowance to counsel. *Held*, that such allowance was not excessive, in so far as such executors were concerned.

—Page v. Rogers, 149 Fed. 194.....79 C. C. A. 153

**§ 6. —— Claims against and distribution of estate.**

A claim for unliquidated damages resulting from injury to the property of another, not connected with or growing out of any contractual relation, is not provable in bankruptcy, under the existing law.

—Brown & Adams v. United Button Co., 149 Fed. 48..79 C. C. A. 70

Where, therefore, wool dealers had a warehouse for the storage of wool, which adjoined a building formerly used by the bankrupt as a factory, the two being simply separated by a party wall, and by reason of excessive heat from the furnaces of the bankrupt, which penetrated through the wall, their wool was dried out and damaged, losing weight and depreciating in price, in consequence, a claim for damages for the loss, treating it either as the result of negligence or nuisance, was not provable against the bankrupt's estate.

—Brown & Adams v. United Button Co., 149 Fed. 48..79 C. C. A. 70

The debts which may be proved under Bankr. Act July 1, 1898, as specified in section 63, subsec. a, 30 Stat. 562, c. 541 [U. S. Comp. St. 1901, p.



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3447], are fixed liabilities as evidenced by a judgment or an instrument in writing absolutely owing, whether payable immediately or not; taxable costs in certain cases; and claims upon open account or upon contract, express or implied. And while it is further provided by subsection b that "unliquidated claims against the bankrupt may, pursuant to application to the court be liquidated in such manner as it may direct, and may therefore be proved and allowed against his estate," this does not make claims for unliquidated damages provable generally, nor, indeed, add anything to the class of debts which may be proved according to the preceding subsection, but has merely to do with a matter of procedure, as to how unliquidated claims, founded upon open account or contract, previously specified, may be liquidated or made certain.

—Brown & Adams v. United Button Co., 149 Fed. 48..79 C. C. A. 70

Nor are the debts which may be proved in bankruptcy under section 63 of the existing act (Bankr. Act. July 1, 1898, 30 Stat. 562, c. 541 [U. S. Comp. St. 1901, p. 3447]) enlarged by the fact that it is assumed, in section 17 (30 Stat. 550 [U. S. Comp. St. 1901, p. 3429]), regulating the effect of a discharge, that liabilities for torts are provable and so discharged, certain specified torts being thereupon excepted from the effect of a discharge; the want of harmony in this respect, between the two sections, being the result of the changes made in that section by the amendment of 1903, and, in case of conflict, section 63, which is devoted specifically to what debts are made provable, being controlling.

—Brown & Adams v. United Button Co., 149 Fed. 48..79 C. C. A. 70

The reasonable fee of counsel employed by a bankrupt's trustee to recover a voidable or fraudulent preference made by the bankrupt constitutes a part of the trustee's expenses, and, as such, a part of the costs and expenses of administration, entitled to preferential payment.

—Page v. Rogers, 149 Fed. 194.....79 C. C. A. 153

A creditor holding the note of a bankrupt, and, as collateral security therefor, another note on which the bankrupt is also liable, is not entitled to prove his claim against the estate in bankruptcy for both, but only for the amount of the actual indebtedness to him.

—First Nat. Bank v. Eason, 149 Fed. 204.....79 C. C. A. 162

Where a member of an insolvent firm was adjudged a bankrupt, and the firm had no assets, firm creditors were not entitled to share in the individual assets of the bankrupt partner, which were insufficient to pay his individual debts, under Bankr. Act July 1, 1898, c. 541, § 5, subsecs. "f," "g," "h," 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424], providing that the net proceeds of the individual estate of each partner shall be applied to the payment of his individual debts, and that the surplus only shall be applied to pay partnership debts, etc.

—Euclid Nat. Bank v. Union Trust & Deposit Co., 149 Fed. 975..... 79 C. C. A. 485

**§ 7. Rights, remedies, and discharge of bankrupt.**

Where a bankrupt residing in New York was a member of a firm doing business in Port Huron, Michigan, the failure of such firm to keep proper books of account, and the bankrupt's failure, for a period of a year, during which the firm did business, to see that proper books were kept, did not preclude him from obtaining a discharge for failure to keep proper books, as provided by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 684].

—In re Garrison, 149 Fed. 178.....79 C. C. A. 126

Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 684] provides that a bankrupt shall be discharged unless he has, with intent to conceal his financial condition, destroyed, concealed or failed to keep books of account or records from which such condition might be ascertained. *Held*, that, where a creditor seeks to prevent a discharge on such ground, the burden is on him, not only to show that the bank-

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rupt failed to keep books of account, but that his omission was with intent to conceal his financial condition.
—In re Garrison, 149 Fed. 178.....79 C. C. A. 126

A court of bankruptcy has power to amend an order of discharge at any time before the proceedings in the case have been closed provided such amendment will not affect vested rights.
—In re Diamond, 149 Fed. 407.....79 C. C. A. 227

Partnership creditors may prove their claims against the estate of a bankrupt partner, although entitled to share only in the surplus of his estate after his individual creditors have been paid, and where their debts have been scheduled, and they have had due notice of the proceedings, the bankrupt is entitled to a discharge from such debts as well as his individual debts.
—In re Diamond, 149 Fed. 407.....79 C. C. A. 227

**§ 8. Appeal and revision of proceedings.**
On petition to the Circuit Court of Appeals to review orders of the District Court in bankruptcy proceedings, only questions of law arising out of the facts found or conceded can be considered.
—In re Throckmorton, 149 Fed. 145.....79 C. C. A. 15

Where an application for a bankrupt's discharge was heard on briefs and the report of a referee overruling the specifications of objection, and the referee's findings, so far as they were disputed, were amply supported by the testimony, an order denying the application will be reversed on appeal.
—Boyd v. Arnold, Loucheim & Co., 149 Fed. 187.....79 C. C. A. 135

Bankruptcy Act July 1, 1898, c. 541, § 25, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], provides that appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals in specified cases, including a judgment allowing or rejecting a debt or claim of $500 or more. *Held* that, where a decree rejected a claim for $30,000 which petitioner offered to prove against the bankrupt's estate, petitioner's remedy was by appeal, and, having obtained relief by appeal, his petition to superintend and revise should be dismissed.
—Union Nat. Bank of Kansas City, Mo., v. Neill, 149 Fed. 720..... 79 C. C. A. 426

Where an order was entered in bankruptcy, merely denying petitioner's right to participate in the individual assets of the bankrupt until the individual creditors had been first paid, and no order was entered either by the referee or District Court rejecting petitioner's claim, such order was reviewable on a petition for review, and not solely by appeal, under Bankr. Act July 1, 1898, c. 541, §§ 24, 25a, 30 Stat. 553 [U. S. Comp. St. 1901, pp. 3431, 3432].
—Euclid Nat. Bank v. Union Trust & Deposit Co., 149 Fed. 975..... 79 C. C. A. 485

**§ 9. Offenses against bankrupt laws.**
Bankr. Act July 1, 1898, c. 541, § 29, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3433], provides that a person shall be punished by imprisonment on conviction of having knowingly and fraudulently made a false oath or account in or in relation to any proceeding in bankruptcy, and Act July 1, 1898, c. 541, § 2, subd. 12, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3421], imposes the duty to discharge or refuse to discharge bankrupts on courts of bankruptcy as one of the "bankruptcy proceedings." Act July 1, 1898, c. 541, § 30, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3434], authorizes the Supreme Court of the United States to prescribe all necessary rules, forms, and orders for carrying the act into effect, pursuant to which general order No. 12 was adopted, declaring that applications for a discharge shall be heard and decided by the judge, with authority to refer the application or any specified issue to a referee to ascertain and report the facts. *Held*, that the term "false oath" was not limited to the examination of the bankrupt, authorized by Act July 1, 1898, c. 541,

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§ 7, subd. 9, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3425], nor to false swearing in connection with the bankrupt's schedules, but related to any proceeding in bankruptcy, including the examination of the bankrupt before a referee on an investigation of specifications filed against his discharge.

—Edelstein v. United States, 149 Fed. 636.....79 C. C. A. 328

Section 7, subd. 9, supra, does not grant immunity to the bankrupt from prosecution for testifying falsely in a proceeding to investigate the truth of specifications filed against his discharge.

—Edelstein v. United States, 149 Fed. 636.....79 C. C. A. 328

## BANKS AND BANKING.

Argument and conduct of counsel in prosecution for violation of national banking act, see "Criminal Law," § 4.

Harmless error in prosecution for violation of national banking act, see "Criminal Law," § 6.

Injunction against receiver of national bank to preserve funds pending litigation, see "Injunction," § 2.

**§ 1. Functions and dealings.**

A bank has no general lien on securities deposited with it for a special purpose.

—Van Zandt v. Hanover Nat. Bank, 149 Fed. 127.....79 C. C. A. 23

Defendant bank prepared and took a contract, signed by a correspondent bank, by which the latter agreed that "all bills of exchange, notes, * * * money, and property of every kind owned by the undersigned, * * * deposited with the said bank or under its control, as collateral security for loans or advances already made or hereafter to be made, to or for account of the undersigned, by said bank or otherwise," might be held by it as security for any and all indebtedness of the correspondent. *Held*, that such contract applied only to security or property deposited with defendant as collateral security, the words "or otherwise" having reference to the nature of the liability for which the collateral should remain as security, and not to the manner in which it came into defendant's possession, and that it did not give defendant a lien on notes sent it by the correspondent for discount and credit, but which it declined to discount, to secure an overdraft unintentionally made by the correspondent in the expectation that the notes would be discounted and the proceeds placed to its credit.

—Van Zandt v. Hanover Nat. Bank, 149 Fed. 127.....79 C. C. A. 23

**§ 2. National banks.**

Evidence that the cashier of a national bank overdrew his account, by means of checks which were not charged to his account, but carried in the drawer as cash and afterwards taken up by his note, all without the knowledge or consent of the board, is sufficient to warrant his conviction by a jury of misapplication of the bank's funds, in violation of Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497].

—Brock v. United States, 149 Fed. 173.....79 C. C. A. 121

Where a national bank continued its existence and performed the functions of such an association after the expiration of its original corporate existence for a long period of time, it would be presumed to have accepted the benefit of a certificate executed by the Comptroller of Currency extending its corporate existence.

—Clement v. United States, 149 Fed. 305.....79 C. C. A. 243

U. S. Comp. St. 1901, p. 3497, § 5209, provides that, if any president of a national bank makes any false statement concerning the association with intent to injure or defraud the association or any other company, body politic, or any individual person, or to deceive any officer of the

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association, or any agent selected to examine the affairs of any such association, he shall be guilty of a misdemeanor. *Held* that, where the president of a national bank made a false report to the Comptroller of the Currency with intent to deceive an examiner who might be appointed to make an examination of the bank, as provided by section 5240 [U. S. Comp. St. 1901, p. 3516], such act constituted an offense, irrespective of the existence of any other incidents disjunctively mentioned in section 5209.
—Clement v. United States, 149 Fed. 305.....79 C. C. A. 243

A count in an indictment for violating the national banking act alleged that accused, as president of the bank, made an entry in the bank's daily journal of the words and figures following: "Other Real Estate. A. Barton Farm, $3,350.00;" that the entry indicated that the south half of a specified quarter section of land was a certain 80-acre tract known as the "Barton Farm," and was an asset of the bank in the sum of $3,350.00; that the entry so made was false, in that the same described land was not then and there an asset of the bank of the value of $3,350.00, or of any sum whatsoever. *Held*, that such count was not defective as failing to charge that the A. Barton farm was known or described in accordance with the description recited, or was identified therewith, or because it was not charged that the A. Barton farm was not an asset of the bank.
—Clement v. United States, 149 Fed. 305.....79 C. C. A. 243

U. S. Comp. St. 1901, p. 3497, § 5209, provides that every president of a national bank who makes any false entry in any book or report of the association, with intent to injure or defraud it or any other person, company, or body politic or corporate, shall be guilty of a misdemeanor, etc. *Held*, that an indictment under such section, alleging that accused, while acting as president of a national bank, made a false entry in a report to the Comptroller of Currency, that the lawful money reserve in the bank, consisting of gold coin, was $23,955, when in fact the bank only had $21,955 in gold coin as lawful money reserve, was not objectionable for want of an allegation that the lawful reserve exceeded the amount the bank actually had on hand; the gist of the offense being the making of false entries in the report.
—Clement v. United States, 149 Fed. 305.....79 C. C. A. 243

In a prosecution of the president of a national bank, evidence *held* sufficient to justify a conviction for willfully misapplying the bank's funds, and converting the same to the use of himself or others, in violation of Rev. St. § 5209 [U. S. Comp. St. 1901, pp. 3491, 3497].
—Clement v. United States, 149 Fed. 305.....79 C. C. A. 243

Where a certificate of the Comptroller of the Currency recited that a certain bank had complied with all the provisions of the act of Congress of July 12, 1882, authorizing an extension of the corporate existence of such banks, and declared that the bank was authorized to have succession until November 21, 1908, such certificate was conclusive evidence, in a prosecution of the president of the bank for violating the national bank act, of a compliance by the bank with all necessary conditions precedent to the extension of its charter.
—Clement v. United States, 149 Fed. 305.....79 C. C. A. 243

The discounting by the president of a national bank with the funds of the bank of commercial paper known by him to be worthless or fictitious, for the benefit of an insolvent corporation of which he is an officer, and with intent to injure and defraud the bank, is a willful misapplication of its funds, constituting a criminal offense under Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497.]
—Flickinger v. United States, 150 Fed. 1.....79 C. C. A. 515

In an indictment under Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], charging an officer of a national bank with a willful misapplication of its funds with intent to injure and defraud the association, it is not neces-

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sary to aver that the acts set out were done without authority from the directors.
—Flickinger v. United States, 156 Fed. 1.....79 C. C. A. 515

## BAR.

Of action by former adjudication, see "Judgment," § 3.

## BETTING.

See "Gaming."

## BIAS.

Of witness, see "Witnesses," § 2.

## BILL OF EXCEPTIONS.

See "Exceptions, Bill of."

## BILL OF EXCHANGE.

See "Bills and Notes."

## BILL OF REVIEW.

See "Equity," § 3.

## BILLS AND NOTES.

Authority of partner to execute, see "Partnership," § 1.
Harmless error in action on note, see "Appeal and Error," § 7.
Note for price of land, see "Vendor and Purchaser," § 2.
Validity of release of note, see "Release," § 1.

**§ 1. Rights and liabilities on indorsement or transfer.**

Where a series of notes were signed by three persons, the second signer being a firm which subsequently became a bankrupt, the firm's contract as principal was to pay the entire amount of the notes, and this was not changed by the fact that other signers had made the same promise.
—Union Nat. Bank of Kansas City, Mo., v. Neill, 149 Fed. 711.....
79 C. C. A. 417

Where a note when presented to petitioner for discount was signed on its face by three persons, the fact that the name of a partnership subsequently adjudged a bankrupt appeared as the second signer was not notice to petitioner that the firm signed only as surety for the first signer.
—Union Nat. Bank of Kansas City, Mo., v. Neill, 149 Fed. 711.....
79 C. C. A. 417

Where a series of notes discounted by petitioner were all signed by three persons, a partnership which subsequently became a bankrupt being the second signer, the notes on their face did not indicate a contract of suretyship by which the second signer on being compelled to pay the entire note did so to the extent of two-thirds thereof as surety for the others.
—Union Nat. Bank of Kansas City, Mo., v. Neill, 149 Fed. 711.....
79 C. C. A. 417

Where the holder of negotiable paper acquired it before maturity from another, who was apparently the owner, and gave a consideration therefor, he obtained a good title, though he had knowledge of facts and cir-

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cumstances that would cause him or a man of ordinary prudence to suspect that the person from whom he obtained it had no interest therein or authority to use it for his own benefit, and though by ordinary diligence he could have ascertained such facts.
—Union Nat. Bank of Kansas City, Mo., v. Neill, 149 Fed. 711..... 79 C. C. A. 417

Though a member of a trading partnership has no implied power to sign the firm name as an accommodation indorser of a note, yet, if he does so, his unauthorized act constitutes no defense to the firm as against a bona fide purchaser for value in due course; the paper being such as to be subject to the law merchant.
—Union Nat. Bank of Kansas City, Mo., v. Neill, 149 Fed. 711..... 79 C. C. A. 417

## BONA FIDE PURCHASERS.

Of bill of exchange or promissory note, see "Bills and Notes," § 1.

## BREACH.

Of contract, see "Contracts," § 4; "Sales," § 3; "Vendor and Purchaser," § 2.

## BRIEFS.

On appeal or writ of error, see "Appeal and Error," § 5.

## BROKERS.

As bankrupt, see "Bankruptcy," § 2.

## BUILDING CONTRACTS.

See "Contracts," § 4.
Liquidated damages or penalties, see "Damages," § 2.

## CANCELLATION OF INSTRUMENTS.

See "Quieting Title."

*Grounds for cancellation or rescission of particular instruments.*

See "Contracts," § 3.
Contracts for sale of goods, see "Sales," § 2.
Contracts for sale of realty, see "Vendor and Purchaser," § 1.
Deed of public land, see "Public Lands," § 1.

## CARGO.

See "Shipping."

## CARRIERS.

Carriage of passengers by vessels, see "Shipping," § 1.
Instructions as to contributory negligence in general of passengers, see "Negligence," § 1.
Nature and form of bill of exceptions in action for injuries to passenger, see "Exceptions, Bill of," § 1.
Recovery back of payment made to carrier, see "Payment," § 1.

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**§ 1. Control and regulation of common carriers.**

Semble, that a railroad company engaged in interstate commerce in its schedules of rates and classifications filed with the Interstate Commerce Commission pursuant to Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3156], may state separately its rate for the carriage of ordinary commodities of a particular class and its charge for icing cars when commodities of the same class are of a character requiring to be shipped under refrigeration, and that its collection of both charges when refrigeration is used is lawful, provided they are each reasonable and do not cover double compensation for the same service.

—Knudsen-Ferguson Fruit Co. v. Michigan Cent. R. Co., 148 Fed. 968.....79 C. C. A. 46

**§ 2. Carriage of goods.**

To support an action by a shipper against a carrier under section 8 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 382 [U. S. Comp. St. 1901, p. 3159]), he must show either that there has been some unreasonable or excessive charge imposed or some unlawful discrimination practiced against him by which he has been pecuniarily damaged, and he cannot recover, on a merely technical construction of the law, because, in addition to the ordinary scheduled rate, an extra charge for icing service, also shown by the schedules, but separately, has been collected from him, where such charge is not shown to be unreasonable and has not been so held by the Interstate Commerce Commission.

—Knudsen-Ferguson Fruit Co. v. Michigan Cent. R. Co., 148 Fed. 968.....79 C. C. A. 46

**§ 3. Carriage of passengers.**

In an action for injuries to a passenger by a missile coming through an open car window, plaintiff's evidence was that the missile entered through an open window on the side next to a passing freight train, that it was a bolt with a nut on the end of it, and that such bolts were largely used in constructing ordinary freight cars, while, on the other hand, there was evidence that the missile was thrown through an open window on the opposite side of the car by one of several boys who were pelting the train as it went by them. *Held*, that the evidence as to whether the missile came from a source for which the carrier was responsible was insufficient to justify a verdict against it, and that a verdict should, therefore, have been directed in its favor.

—Pennsylvania R. Co. v. McCaffrey, 149 Fed. 404....79 C. C. A. 224

In an action against a carrier for injuries to a passenger, the burden of proof of negligence is on the plaintiff, and cannot be shifted to the defendant without showing that the injury in question was caused by some person or thing connected with the carrier's railroad or business of transportation.

—Pennsylvania R. Co. v. McCaffrey, 149 Fed. 404....79 C. C. A. 224

The announcement of the next station by a porter on a railway passenger train, though made on the near approach to the station, is not an invitation to a passenger to leave his seat and attempt to alight before the train actually stops.

—Illinois Cent. R. Co. v. Warren, 149 Fed. 658.....79 C. C. A. 350

In an action for injuries to a passenger by being pushed from a car platform by the car porter while the train was in rapid motion, evidence *held* insufficient to warrant a finding that the porter's act was willful or other than accidental or negligent.

—Illinois Cent. R. Co. v. Warren, 149 Fed. 658.....79 C. C. A. 350

Plaintiff and his brother-in-law were riding on a railroad train, guarding a negro. On the announcement of the station where they intended to alight, plaintiff, for the purpose of resuming custody of the negro and of getting off quickly, left his seat in the smoking compartment while the train was in motion, and went forward through the colored compartment

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to the front door of the car, which he opened, and stood there waiting for the train to slow down, with his right foot on the door sill, his left foot on the platform, and his right hand on the door facing, from which position he was knocked or pushed by the train porter, so that he fell from the car while the train was in rapid motion, and was injured. *Held*, that plaintiff was guilty of contributory negligence in taking the position he did, and was not entitled to recover, in the absence of proof that the action of the train porter was willful.
—Illinois Cent. R. Co. v. Warren, 149 Fed. 658.....79 C. C. A. 350

## CHANCERY.

See "Equity."

## CHARACTER.

Of witness, see "Witnesses," § 2.

## CHATTEL MORTGAGES.

As act of bankruptcy, see "Bankruptcy," § 1.
Effect of proceedings in bankruptcy, see "Bankruptcy," § 3.

## CHEAT.

See "Fraud."

## CHECKS.

See "Bills and Notes."

## CIRCUIT COURTS OF APPEALS.

See "Courts," § 1.
Dismissal of appeal in, see "Appeal and Error," § 5.

## CITIES.

See "Municipal Corporations."

## CITIZENS.

See "Aliens"; "Indians."
Citizenship ground of jurisdiction of United States courts, see "Courts," § 1.

## CLAIMS.

Against estate of bankrupt, see "Bankruptcy," § 6.
Mining claims, see "Mines and Minerals," § 1.

## CLERKS OF COURTS.

Entry by clerk of judgment, see "Judgment," § 1.

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## CLOUD ON TITLE

See "Quieting Title."

## COLLATERAL ATTACK.

On judgment, see "Judgment," § 2.

## COLLATERAL UNDERTAKING.

See "Guaranty."

## COLLISION.

Variance between pleading and proof in action for in admiralty, see "Admiralty," § 1.

**§ 1. Rules and precautions for preventing collisions in general.**

In the admiralty law the phrase "inevitable accident" has a comprehensive meaning, and it is not necessary that the accident should be the result of a vis major. If no negligence can be imputed to either vessel in a collision, there is a presumption that they were navigating in a lawful manner and the accident may be said to be inevitable; the test being whether the collision could have been prevented by the exercise of ordinary care, caution, and maritime skill.

—The Jumna, 149 Fed. 171; The McCaldin Bros., Id.; The James S. T. Stranahan, Id.; The Gypsum King, Id.; The Freeland Dalzell, Id.; The J. B. King Co. No. 19, Id.; The Gypsum Emperor, Id. ..... 79 C. C. A. 119

Where the evidence is so conflicting that it is impossible to determine to what direct or specific acts a collision is attributable, it is a case of damage arising from a cause that is inscrutable, and under the settled modern rule in this country there can be no recovery or partial recovery therefor.

—The Jumna, 149 Fed. 171; The McCaldin Bros., Id.; The James S. T. Stranahan, Id.; The Gypsum King, Id.; The Freeland Dalzell, Id.; The J. B. King Co. No. 19, Id.; The Gypsum Emperor, Id. ..... 79 C. C. A. 119

**§ 2. Vessels in tow.**

A tug coming down the Hudson river at night with a long tow *held* in fault for a collision between her tow and a dredge anchored at the side of the channel in a position known to the tug, and the dredge also *held* in fault for remaining at night in a place where by reason of a bend in the river it was difficult for vessels with long tows to pass her in safety.

—Ross v. Cornell Steamboat Co., 149 Fed. 196 ..... 79 C. C. A. 514

**§ 3. Suits for damages.**

Evidence *held* to sustain the finding of a court of admiralty that it did not establish negligence or fault on the part of any of the vessels concerned in a series of collisions in East river, following the parting of a tug's hawser, and to exonerate all from liability on the ground that the collisions were due to inevitable accident or to an inscrutable cause.

—The Jumna, 149 Fed. 171; The McCaldin Bros., Id.; The James —S. T. Stranahan, Id.; The Gypsum King, Id.; The Freeland Dalzell, Id.; The J. B. King Co. No. 19, Id.; The Gypsum Emperor, Id. ..... 79 C. C. A. 119

## COMBINATIONS.

See "Conspiracy."

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## COMMERCE.

Carriage of goods and passengers, see "Carriers"; "Shipping."

## COMMERCIAL PAPER.

See "Bills and Notes."

## COMMISSION.

Power of state railroad and warehouse commission to regulate crossing of railroads in cities as affecting power of council, see "Municipal Corporations," § 1.

## COMMON CARRIERS.

See "Carriers."

## COMPENSATION.

Of agent, see "Principal and Agent," § 1.
Salvage, see "Salvage," § 1.

## COMPETITION.

Unfair competition, see "Trade-Marks and Trade-Names," § 1.

## COMPLAINT.

In criminal prosecutions, see "Indictment and Information."

## COMPROMISE AND SETTLEMENT.

See "Payment"; "Release."

## CONDEMNATION.

Taking property for public use, see "Eminent Domain."

## CONFIRMATION.

Of sale of property belonging to bankrupt estate, see "Bankruptcy," § 4.

## CONSIDERATION.

Of contract in general, see "Contracts," § 1.

## CONSPIRACY.

§ 1. **Civil liability.**
Where the petition in an action to recover money alleged to have been obtained from plaintiff by means of a conspiracy between defendant bank and others alleged that such conspiracy covered an extended period of

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time, both before and after the transaction in suit, and was organized for the purpose of swindling all strangers who could be induced to enter into similar transactions, evidence of acts of the cashier of defendant bank in respect to similar transactions while conducting the business of the bank, or declarations made by him to other persons similarly defrauded tending to show the bank's complicity, whether such acts and declarations were before or after the transaction in issue, are admissible to establish the guilty intent and motive of the bank in the transaction involved in the case on trial.

—Exchange Bank v. Moss, 149 Fed. 340; Same v. Davis, Id..... 79 C. C. A. 278

## CONSTITUTIONAL LAW.

Provisions relating to judgment, see "Judgment," § 4.
Provisions relating to jury, see "Jury," § 1.

## CONTINUANCE.

In criminal prosecutions, see "Criminal Law," § 3.
Review of discretionary rulings on application for, see "Criminal Law," § 6.

## CONTRACTS.

Alien contract labor, see "Aliens," § 1.
Damages for breach, see "Damages," § 1.
Liquidated damages or penalties, see "Damages," § 2.
Operation and effect of gaming laws, see "Gaming," § 1.
Specific performance, see "Specific Performance."

*Contracts of particular classes of persons.*

See "Master and Servant."

*Contracts relating to particular subjects.*

See "Patents," § 4.

*Particular classes of express contracts.*

See "Bills and Notes"; "Guaranty"; "Insurance"; "Partnership"; "Rewards"; "Sales."
Agency, see "Principal and Agent."
Employment, see "Master and Servant."
Sales of realty, see "Vendor and Purchaser."

*Particular modes of discharging contracts.*

See "Payment"; "Release."

**§ 1. Requisites and validity.**

The rule applied that a contract by an inventor, in consideration of his employment for a term of years at a salary, to assign to his employer a half interest in all inventions made by him during the term, is not contrary to public policy

—Wright v. Vocalion Organ Co., 148 Fed. 209.....79 C. C. A. 183

**§ 2. Construction and operation.**

An instrument is to be most strictly construed against the party who prepared it.

—Van Zandt v. Hanover Nat. Bank, 149 Fed. 127.....79 C. C. A. 23

A contract by which one party was constituted the sole manufacturer and the sole sales agent for a machine under a patent owned by the

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other, and required to manufacture and have ready for delivery at least 50 machines each year, provided there was sale for such number, placed upon such agent by implication the duty of exercising reasonable diligence in endeavoring to market the machines, and rendered it liable for a breach of the contract if by reason of its failure to do so the required 50 machines were not manufactured and sold each year.

—Wildman Mfg. Co. v. Adams Top Cutting Mach. Co., 149 Fed. 201.. 79 C. C. A. 159

Complainant was a corporation engaged in the manufacture of musical instruments, including organs, and defendant was its superintendent of factories and had made certain inventions relating to organs. A new contract was made between them by which, in consideration of an increased salary for a term of five years, it was provided, in clause 2, that a one-half interest in all improvements or inventions made by defendant during the term "in or relative to organs, both keyed and automatic," should be assigned to complainant, and they should be patented at complainant's cost. By clause 4 it was provided that complainant should have the exclusive right to purchase and use improvements and inventions made by defendant during the term "in self-playing pianos or self-playing devices for playing pianos," on such terms as should be agreed upon. Defendant during the term made and patented certain inventions which were applicable alike to organs and to self-playing pianos. *Held*, that such inventions were within the contract, and complainant was entitled to an assignment of a half interest therein, or a perpetual license to use the same without further payment, but only in so far as they related to organs, as expressed in the second clause of the contract.

—Wright v. Vocalion Organ Co., 148 Fed. 209.....79 C. C. A. 183

**§ 3. Rescission and abandonment.**

The right to rescind a contract for misrepresentation and fraud must be exercised immediately upon discovery of the fraud, or of sufficient evidence thereof to reasonably warrant such action. The intention to rescind must be manifested by some notice or outward manifestation thereof which will apprise the other party of such intention, and the party entitled to rescind must not vacillate in his purpose, but must consistently adhere to it.

—Richardson v. Lowe, 149 Fed. 625.....79 C. C. A. 317

**§ 4. Performance or breach.**

Where a building contract which contained a stipulation for the payment of liquidated damages by the contractor in case of delay in the completion of the work also provided that if such delay should be caused by the default of the owner, architect, or other contractors, the time of such delay should be allowed him, but that no such allowance should be made unless a claim therefor should be made to the owner or architect within 24 hours, the latter clause is enforceable and binding on the contractor.

—Chapman Decorative Co. v. Security Mut. Life Ins. Co., 149 Fed. 189 79 C. C. A. 137

**§ 5. Actions for breach.**

The legal presumption is that parties to contracts valid on their faces intend in good faith to perform them. One who would avoid his contracts and escape their obligations by his own wrong should establish it by clear proof. A speculator dealt in about 14,000,000 bushels of grain, and less than 2 per cent. of it was delivered. He made contracts valid on their faces for the purchase of grain for future delivery through brokers, who were members, respectively, of the Board of Trade of Chicago or of the Merchants' Exchange of St. Louis, and became indebted to them for balances of account. He testified that he did not intend to deliver or to receive any grain under his contracts unless forced to do so in order to prevent his contracts from being closed out under the rules of the board or the exchange. *Held*, that this evidence did not establish an illegal intention, because it did not disclose a purpose to settle the obligations of his contracts by paying to, or receiving from, the other parties thereto the dif-

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ferences between the contract prices and the market prices at the times of delivery, but it was consonant with an intention to settle the obligations of his contracts as far as possible by set-off and by ringing off and by the payment of differences in accordance with the rules of the board, and to deliver and receive that portion of the contracted grain for which he could not thus settle; and this was not an unlawful intention, and did not render the transactions wagers or void.
—Cleage v. Laidley, 149 Fed. 346.....79 C. C. A. 284

## CONTRIBUTION.

Between purchasers of land incumbered with annuity, see "Vendor and Purchaser," § 3.

## CONTRIBUTORY NEGLIGENCE.

See "Negligence," § 1.
Of passenger, see "Carriers," § 3.
Of person injured by operation of street railroad, see "Street Railroads," § 1.
Of servant, see "Master and Servant," § 1.

## CONVEYANCES.

See "Mortgages."

## CORPORATIONS.

*Particular classes of corporations.*

See "Municipal Corporations"; "Railroads"; "Street Railroads."
Insurance companies, see "Insurance."
Water companies, see "Waters and Water Courses," § 1.

**§ 1. Corporate powers and liabilities.**
H., being indebted to claimant on certain notes and desiring to form a corporation to take over his merchandise business, informed claimant of his intention. Claimant demanded that, if H. did so, the corporation should guaranty the paper. H. formed the corporation and sold the business to it, taking in return full paid capital stock, after which H., as president of the corporation, indorsed a guaranty on the notes to claimant on behalf of the corporation, after which H. acquired all of the corporation's stock. *Held*, that the corporation, never having received any benefit from its ultra vires act in guarantying such notes, was not estopped to deny the power to execute such guaranty.
—Evans v. Johnson, 149 Fed. 978.....79 C. C. A. 488

**§ 2. Foreign corporations.**
Plaintiff, an Alabama corporation, with no warehouse, office, or domicile in Tennessee, contracted through a broker in Tennessee to sell cotton to defendants, to be delivered to a carrier in Alabama for foreign transportation and delivery. *Held*, that such transaction constituted interstate, and not local, commerce, and that plaintiff was not, therefore, doing business in Tennessee, within a statute of that state regulating foreign corporations.
—McBath v. Jones Cotton Co., 149 Fed. 383.....79 C. C. A. 203

## COUNCIL.

See "Municipal Corporations," § 1.

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## COUNTERCLAIM.

See "Set-Off and Counterclaim."

## COUNTIES.

See "Municipal Corporations."

## COURTS.

Criminal jurisdiction, see "Criminal Law," § 1.
Removal of action from state court to United States court, see "Removal of Causes."
Review of decisions, see "Appeal and Error."
Selection of grand juries from federal districts, see "Grand Jury."
Set-off in action for conversion in federal court, see "Set-Off and Counterclaim," § 1.
Summoning jury for federal courts, see "Jury," § 1.
Taking case or question from jury in federal court, see "Trial," § 1.

**§ 1. United States courts.**

Act Cong. March 3, 1891, c. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549], provides that writs of error may be taken direct to the Supreme Court in any case in which the jurisdiction of the circuit court is in issue, and section 6 (26 Stat. 828 [U. S. Comp. St. 1901, p. 549]) declares that the Circuit Courts of Appeal shall have jurisdiction in all cases except those provided for in section 5. *Held*, that the Circuit Court of Appeals has no jurisdiction to pass on questions challenging the jurisdiction of Circuit Courts.

—Boston & M. R. Co. v. Gokey, 149 Fed. 42.....79 C. C. A. 64

The testimony of a plaintiff that he was at "home" in a certain town and that he lived there is sufficient proof of his citizenship in the state in which such town is situated to sustain the jurisdiction of a federal court in a suit against a corporation of another state, although the averment of citizenship in his declaration is defective.

—Baltimore & O. S. W. R. Co. v. Davis, 149 Fed. 191..79 C. C. A. 139

Equity rules adopted by the federal courts, as authorized by Rev. St. § 917 [U. S. Comp. St. 1901, p. 684], have the force and effect of law.

—Bryant Bros. Co. v. Robinson, 149 Fed. 321.....79 C. C. A. 259

Judiciary Act March 3, 1891, c. 517, § 15, 26 Stat. 830 [U. S. Comp. St. 1901, p. 554], provides that the Circuit Court of Appeals, in cases in which its judgment is final, shall have appellate jurisdiction to review judgments of the Supreme Courts of the several territories within their particular circuits, etc. Section 5, as amended by Act Cong. Jan. 20, 1897, c. 68, 29 Stat. 492 [U. S. Comp. St. 1901, p. 549], declares that appeals or writs of error may be taken from the District Courts or existing Circuit Courts direct to the Supreme Court in cases of conviction of a capital crime. Section 6 (Act March 3, 1891, c. 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 549]) provides that the Circuit Court of Appeals shall have appellate jurisdiction to review any final decision in a District Court or existing Circuit Courts in all cases other than those provided for in the preceding section, unless otherwise provided by law, and that the judgments and decrees of the Circuit Court of Appeals shall be final in all cases arising under the criminal laws, except, etc. *Held*, that the Circuit Court of Appeals has jurisdiction on writ of error to review a conviction for grand larceny, in violation of the laws of a territory, which has been affirmed by the Supreme Court of the territory.

—Miller v. Territory of Oklahoma, 149 Fed. 330.....79 C. C. A. 268

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The act of conformity (section 914, Rev. St. 1899) has no application to the practice or proceedings of appellate courts or to matters relating to bills of exceptions, motions for new trials, or any other means adopted to secure a review of the judgments or decrees of the Circuit or District Courts. Its effect is limited to the practice and proceedings in the trial courts to secure their judgments.

—Francisco v. Chicago & A. R. Co., 149 Fed. 354.....79 C. C. A. 292

The power and practice of the federal appellate courts are derived exclusively from the Constitution, the acts of Congress, the common law, the ancient English statutes, and the rules and practice of the courts of the United States, and they are neither controlled nor affected by the statutes of the states or the practice of their courts.

—Francisco v. Chicago & A. R. Co., 149 Fed. 354.....79 C. C. A. 292

In a suit in the federal courts, a question of jurisdiction is fundamental, and may be raised at any time, in any mode, and at every step in the proceedings, either by the court of its own motion or by the parties, and such investigation may be instituted as shall be necessary to establish or defeat the court's jurisdiction.

—Kreider v. Cole, 149 Fed. 647.....79 C. C. A. 339

Act Cong. March 3, 1875, c. 137, § 5, 18 Stat. 472 [U. S. Comp. St. 1901, p. 511], provides that if a suit brought in or removed to a Circuit Court of the United States does not involve a controversy properly within its jurisdiction, or if the parties have been improperly joined to create a case cognizable or removable under the act, the court shall dismiss the suit or remand it, as justice may require. *Held* that, where persons largely interested in a Pennsylvania corporation, desiring to institute a suit in the federal courts of Pennsylvania for a receiver, caused certain bonds and stock of little or no value to be assigned to a citizen of New Jersey, who was a mere stenographer in the office of one of the corporation's attorneys, for no other consideration than that he should sign the bill, which the corporation's attorneys thereafter filed, such transaction constituted a fraud on the court's jurisdiction sufficient to defeat it, though the assignment was absolute.

—Kreider v. Cole, 149 Fed. 647.....79 C. C. A. 339

## COVERTURE.

See "Husband and Wife."

## CREDIBILITY.

Of witness, see "Witnesses," § 2.

## CREDITORS.

See "Bankruptcy."

## CRIMINAL LAW.

See "Larceny."
Grand jury, see "Grand Jury."
Impeachment of witness, see "Witnesses," § 2.
Indictment, information, or complaint, see "Indictment and Information."
Offenses against bankrupt laws, see "Bankruptcy," § 9.
Offenses by bank officers, see "Banks and Banking," § 2.

**§ 1. Jurisdiction.**

Act April 20, 1904, 33 Stat. 187 [U. S. Comp. St. Supp. 1905, p. 365] entitled "An act conferring jurisdiction upon United States Commissioners over offenses committed in a portion of the permanent Hot Springs

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Mountain reservation, Ark.," clearly contemplates the creation of a new office of commissioner clothed with special jurisdiction over offenses committed on the reservation, prescribing the fees, that rules of procedure and practice for "said commissioner" shall be prescribed by the District Court, for appeals to such court, etc., but in the absence of any provision therein for the appointment of such commissioner is ineffective and the jurisdiction so conferred to try offenses cannot be exercised by any United States Commissioner within the district or elsewhere.
—Rider v. United States, 149 Fed. 164.....79 C. C. A. 112

§ 2. **Arraignment and pleas, and noble prosequi or discontinuance.**
A plea attacking an indictment alleged that it had been found by a grand jury two of the members of which had been chosen from the bystanders, which had "greatly prejudiced defendant." The plea was not filed until after the indictment had been filed and entered, or until 17 days after defendant had returned to the state. The only excuse given for not interposing it sooner, was that defendant was not present when the grand jury was selected, but was absent, and remained absent from the state until a time later than the return of the indictment. *Held*, that the plea was not filed in time.
—Lowdon v. United States, 149 Fed. 673.....79 C. C. A. 361

§ 3. **Time of trial and continuance.**
Accused, an aged bank president, was arrested February 6, 1905, charged with violating the national banking law, and was indicted on June 9th. In the meantime he was in his usual state of health, but was quarantined because of a contagious disease in his family. After an unavailing demurrer to the indictment and the entry of a plea of not guilty, he applied for a continuance on physicians' affidavits that he was in such a feeble and weak condition that he was unable to endure the strain attendant on a protracted trial, and his own affidavit that he was so infirm as to be unable to make the requisite preparation for trial. A counter affidavit alleged that the government's witnesses were all aged and infirm, and for that reason their attendance at the next term of court was uncertain. The court denied the continuance, reciting in its order that the trial could be conducted in short sessions, and set the case for trial on June 21st. On that day a similar motion was unsuccessfully made before another judge, and after the government had closed its case on June 30th the hearing was adjourned to July 5th. *Held*, that the denial of the continuance was not an abuse of discretion.
—Clement v. United States, 149 Fed. 305.....79 C. C. A. 243

§ 4. **Trial.**
Where accused offered no evidence to prove his good character, and was therefore entitled to rely on a legal presumption that his character was good, it was prejudicial to accused for the prosecuting attorney, in making a strong appeal to the jury to assume that defendant's character was bad because of his failure to prove the contrary, defendant's objection thereto having been overruled, and the district attorney not having withdrawn the argument.
—Lowdon v. United States, 149 Fed. 673.....79 C. C. A. 361

Where, in a prosecution of certain bankers for violating the national bank act, one of defendants' attorneys in argument appealed to the jury saying: "Six of you cannot return a verdict, nor 11, but it takes 12 men to reach a verdict," the intent being to acquaint each juror with his power and responsibility, it was prejudicial error for the district attorney in reply to state that, if a juror decided that defendants were not guilty, when the juror returned home "his neighbors might conclude that the jingle of the broken bankers' unlawfully and ill gotten gold in his pocket" had influenced his action and decision.
—Lowdon v. United States, 149 Fed. 673.....79 C. C. A. 361

Where an indictment under Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], charging an officer of a national bank with willful misapplication



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of its funds, contains counts each based on the discounting of a separate instrument, and another count based on the discounting of all of such instruments, a verdict is not repugnant and inconsistent because it finds the defendant guilty on the latter count and not guilty on the former.

—Flickinger v. United States, 150 Fed. 1.....79 C. C. A. 515

**§ 5. Motions for new trial and in arrest.**

While accused may raise the question of the sufficiency of the indictment to charge a public offense by motion in arrest of judgment, it is better practice to raise the question by demurrer.

—Clement v. United States, 149 Fed. 305.....79 C. C. A. 243

**§ 6. Appeal and error, and certiorari.**

A United States District Court although having original jurisdiction of a criminal offense and also jurisdiction on appeal from the judgment of a commissioner cannot render a valid judgment of conviction on an appeal where the commissioner before whom the case was tried below on a complaint filed by a private individual was without jurisdiction of the subject-matter of the offense even though the defendant took the appeal and appeared and submitted to trial.

—Rider v. United States, 149 Fed. 164.....79 C. C. A. 112

Accused was indicted for violating the national banking act under an indictment containing 27 counts. He demurred unsuccessfully to 10 counts, and was found guilty on 24, and sentenced to a term of 8 years in the penitentiary on each count, with a provision that time should run on all concurrently. *Held* that, as the sentence did not exceed that which might rightfully have been imposed on any one count, defendant was not prejudiced by the overruling of his demurrer to 10 counts of the indictment.

—Clement v. United States, 149 Fed. 305.....79 C. C. A. 243

The denial of an application by accused for a continuance will not be reviewed on a writ of error, in the absence of a showing that the trial court's discretion was abused.

—Clement v. United States, 149 Fed. 305.....79 C. C. A. 243

In a prosecution for larceny, defendant was not prejudiced by certain questions asked a witness by the court concerning a conversation had between witness and defendant, in which witness told defendant that the matter could be fixed up by an explanation.

—Miller v. Territory of Oklahoma, 149 Fed. 330.....79 C. C. A. 268

An assignment that the court erred in not reversing a conviction on account of misconduct of the presiding judge in making prejudicial remarks, insinuations, etc., with reference to accused, his counsel, etc., as appeared from the record of the proceedings in the district court, was fatally defective for failure to point out in the record the alleged prejudicial remarks, rulings, etc.

—Miller v. Territory of Oklahoma, 149 Fed. 330.....79 C. C. A. 268

Where the printed record on a writ of error in a criminal case failed to disclose that any exception was saved to certain alleged objectionable conduct on the part of the trial judge, the objection could not be reviewed.

—Miller v. Territory of Oklahoma, 149 Fed. 330.....79 C. C. A. 268

Where an error is shown in a criminal case, it will be presumed to have been hurtful to the party against whom it has been committed, until it appears to have been rendered innocuous.

—Miller v. Territory of Oklahoma, 149 Fed. 330.....79 C. C. A. 268

## CUSTOMS DUTIES.

**§ 1. Goods subject to duty, rate, and amount.**

So-called remanit, in the form of ropes, braids, and mats, which has been manufactured from silk produced by carbonizing rags containing silk, *held*

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to be a manufacture of silk, within the meaning of Tariff Act July 24, 1897, c. 11, § 1, par. 391, Schedule L, 30 St. 187 [U. S. Comp. St. 1901, p. 1670].
—Frank v. United States, 149 Fed. 1023.....79 C. C. A. 360

## DAMAGES.

For breach by seller of contract for sale of goods, see "Sales," § 4.

**§ 1. Grounds and subjects of compensatory damages.**

Those damages which are the natural and probable result of a breach of a contract, those which the parties may reasonably anticipate as the effect of the breach under the particular circumstances of the case, which are known to them when the contract is made, and those only, may be recovered in actions upon contracts.
—McDonald v. Kansas City Bolt & Nut Co., 149 Fed. 360.....
79 C. C. A. 298

But alleged damages, in addition to those above specified on account of delay, loss of time, trouble, and extra work of superintendence, were too remote and speculative for allowance.
—McDonald v. Kansas City Bolt & Nut Co., 149 Fed. 360.....
79 C. C. A. 298

A manufacturer sold steel pipe-bands, which it knew at the time it made the contract were to be used by the purchaser to bind together staves in wooden pipes for the purpose of conducting water to a city. There were latent defects in the bands made under this contract, which were not discoverable until an attempt was made by the purchaser to bend them around and to fasten them upon the pipes.
*Held*, the loss of the expense of hauling the bands, which were defective, from the railroad station to which they were sent under the contract to the place of their use, a few miles distant, of loading, unloading, distributing, gathering, counting, painting, and of placing them upon and taking them off the pipes when broken, was the natural and probable effect of such defects, which a person of ordinary prudence in the circumstances of the manufacturer would have anticipated, and the vendee was entitled to recover it as damages.
—McDonald v. Kansas City Bolt & Nut Co., 149 Fed. 360.....
79 C. C. A. 298

Proof of knowledge by the defaulting party at the time he makes the contract of special circumstances which make damages other than those ordinarily implied by the contract and naturally flowing from it the natural and probable effect of its breach will warrant the recovery thereof.
—McDonald v. Kansas City Bolt & Nut Co., 149 Fed. 360.....
79 C. C. A. 298

**§ 2. Liquidated damages and penalties.**

A provision of a building contract, reciting that in case of delay in the completion of the building the damages to the owner will be difficult of computation, and that it is therefore agreed that in case of delay beyond the time fixed the contractor shall pay a stated sum per day from that time until completion as liquidated damages, where it is shown that in fact the damages actually sustained by the owner could not be accurately computed, is conclusive upon the parties in the absence of fraud or mutual mistake.
—Chapman Decorative Co. v. Security Mut. Life Ins. Co., 149 Fed. 189
79 C. C. A. 137

## DEATH.

Caused by operation of railroad, see "Railroads," § 2.
Cause of death within insurance policy, see "Insurance," § 2.

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Instructions as to contributory negligence as to person killed, see "Negligence," § 1.
Liability of employer for death of servant, see "Master and Servant," §§ 1, 2.
Necessity and subject-matter of instructions in action for, see "Trial," § 2.

§ 1. **Actions for causing death.**
Under the Ohio wrongful death act, providing that the recovery shall be for the exclusive benefit of the wife or husband, and children, or if there be neither of them, then of the parents and next of kin of the person whose death shall be so caused, the recovery to be apportioned among the beneficiaries with reference to their age and condition and the laws of descent and distribution of personal estates left by persons dying intestate, where decedent died leaving a father and mother and brothers and sisters, the action was properly brought for their joint benefit, and not for the benefit of decedent's next of kin, excluding his parents, though on decedent's death his personal estate would have passed to his brothers and sisters, and not to his father and mother, as provided by Ohio Rev. St. 1906, §§ 4153, 4159.
—Toledo, St. L. & W. R. Co. v. Connolly, 149 Fed. 398..... 79 C. C. A. 218

## DEBTOR AND CREDITOR.

See "Bankruptcy."

## DECEIT.

See "Fraud."

## DECREE.

In equity, see "Equity," § 2.

## DEEDS.

Of trust, see "Mortgages."

## DEFAMATION.

See "Libel and Slander."

## DELIVERY.

Of goods sold, see "Sales," § 3.

## DEMURRER.

In pleading, see "Equity," § 1.

## DEPOSITIONS.

See "Witnesses."

## DEPOSITS.

In bank, see "Banks and Banking," § 1.

## DIRECTING VERDICT.

In civil actions, see "Trial," § 1.

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## DISCHARGE.

From indebtedness, see "Bankruptcy," § 7; "Release."

## DISCOUNTS.

By bank, see "Banks and Banking," § 2.

## DISCRETION OF COURT.

Continuance in criminal prosecution, see "Criminal Law," § 3.
Review of discretionary ruling, see "Criminal Law," § 6.

## DISCRIMINATION.

By carrier, see "Carriers," § 2.

## DISMISSAL AND NONSUIT.

Appealability of judgment of nonsuit, see "Appeal and Error," § 1.
Dismissal of appeal, see "Appeal and Error," §§ 4, 5.
Dismissal of cause removed from state court, see "Removal of Causes," § 3.

## DISTRIBUTION.

Of estate of bankrupt, see "Bankruptcy," § 6.

## DIVERSE CITIZENSHIP.

Ground of jurisdiction of United States courts, see "Courts," § 1.

## DIVORCE.

Action by divorced wife against husband, see "Husband and Wife," § 1.
Conclusiveness of judgment for divorce in action thereon in another state, see "Judgment," § 4.

## DOCKETS.

Of judgments, see "Judgment," § 1.

## DOCKS.

See "Wharves."

## DOMICILE.

Residence as ground of jurisdiction, see "Courts," § 1.

## DUTIES.

Customs duties, see "Customs Duties."

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## EMBEZZLEMENT.

By bank officer, see "Banks and Banking," § 2.

## EMINENT DOMAIN.

**§ 1. Proceedings to take property and assess compensation.**

Shannon's Tenn. Code, relating to condemnation proceedings, provides for a preliminary inquest by a jury, who, if they find for the petitioner, assess the damages sustained and report to the court, whereupon section 1859 declares that, if no objections are made, the report shall be confirmed and the land decreed to the petitioner on payment of the damages assessed, with costs. Section 1861 gives to either party the right to appeal and have his case tried anew before a jury, and section 1863 declares that an appeal does not suspend the operations of the petitioner on the land, provided he give bond with security, etc. Section 1865 provides that the petitioner shall not enter on the land until the damages assessed and the costs have been actually paid, or, if an appeal has been taken, until a bond has been given to abide the final judgment. *Held* that, where judgment has been entered assessing the damages for land sought to be condemned for a railway right of way on the trial of an appeal taken under section 1863, the petitioner was not thereafter entitled at its election to dismiss the proceeding as to a portion of the land sought to be condemned merely because in its opinion the damages assessed were too high.

—Union Ry. Co. v. Standard Wheel Co., 149 Fed. 698. .79 C. C. A. 386

## EMPLOYÉS.

See "Master and Servant."

## ENTRY.

Of judgment, see "Appeal and Error," § 1; "Judgment," § 1.
Of public lands, see "Public Lands," § 1.

## EQUITABLE ESTOPPEL.

See "Estoppel," § 1.

## EQUITABLE SET-OFF.

See "Set-Off and Counterclaim."

## EQUITY.

Equitable estoppel, see "Estoppel," § 1.
Equitable set-off, see "Set-Off and Counterclaim."
Laches in rescinding contract for sale of realty, see "Vendor and Purchaser," § 1.
Removal of equity suit to federal court, see "Removal of Causes," § 4.
Review on appeal in action referred to master, see "Appeal and Error," § 7.

*Particular subjects of equitable jurisdiction and equitable remedies.*

See "Injunction"; "Quieting Title"; "Specific Performance."
Foreclosure of mortgages, see "Mortgages," § 1.
Suits for infringement of patents, see "Patents," § 5.

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**§ 1. Pleading.**

Equity rule 32 authorizes a defendant to demur to a part of the bill and answer as to the residue, and rule 37 declares that no demurrer or plea shall be held bad and overruled only because the answer of the defendant may extend to some part of the same matter covered by such demurrer or plea. *Held*, that a defendant was not entitled to file a demurrer and answer at the same time both attacking the entire bill, and that the simultaneous filing of such answer operated as a withdrawal of the demurrer.

—Bryant Bros. Co. v. Robinson, 149 Fed. 321.....79 C. C. A. 259

A demurrer to a bill not accompanied by a certificate of counsel that it was well founded in point of law, as required by equity rule 31, was fatally defective.

—Bryant Bros. Co. v. Robinson, 149 Fed. 321.....79 C. C. A. 259

A demurrer to a bill not supported by the affidavit of the defendant that it was not interposed for delay as required by equity rule 31, was fatally defective.

—Bryant Bros. Co. v. Robinson, 149 Fed. 321.....79 C. C. A. 259

**§ 2. Decree and enforcement thereof.**

A bill in equity was filed by the lessors in an oil lease against the lessee for a discovery and an accounting with respect to royalties reserved by the lease, and for a specific performance of the contract as to delivery of such royalty oil. The defendant answered, and also filed a cross-bill, in which it insisted on its rights under the lease, and alleged that certain other persons who were made defendants thereto claimed ownership of portions of the land, and prayed that their rights be determined by the court. Such defendants appeared, and with the consent of all parties all questions raised by the pleadings were referred to a master who made findings with respect to the title to the lands, which were confirmed by the court and a decree entered. *Held*, that the bill filed by the original defendant was not a bill of interpleader, but a cross-bill in aid of its answer, setting up matters necessary to be determined as preliminary to a decision on the original bill, and which as such the court had jurisdiction to determine, and that all parties having submitted their rights to such determination were bound by the decree, even if it did declare legal rights.

—Robinson v. Brast, 149 Fed. 149.....79 C. C. A. 19

**§ 3. Bill of review.**

A party will not be given leave to file a bill of review and for a rehearing on the ground of newly discovered evidence, where such evidence is hearsay or otherwise inadmissible.

—Ward v. Ward, 149 Fed. 204.....79 C. C. A. 162

Leave to file a bill of review on the ground of newly discovered evidence will not be granted, where such evidence is merely cumulative on issues joined and tried in the case or where it is immaterial to the issues upon which the case was decided.

—Richardson v. Lowe. 149 Fed. 625.....79 C. C. A. 317

## ERROR, WRIT OF.

See "Appeal and Error."

## ESTABLISHMENT.

Of railroads, see "Railroads," § 1.

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# ESTOPPEL.

By judgment, see "Judgment," § 3.
To deny acceptance of insurance application, see "Insurance," § 1.
To deny corporate power, see "Corporations," § 1.

**§ 1. Equitable estoppel.**

If officers of the United States are authorized to shape its course of conduct as to a particular transaction, and they have acted within the purview of their authority, their acts or omissions may in a proper case work an estoppel against the government.

—United States v. Walker, 148 Fed. 1022.....79 C. C. A. 392

# EVIDENCE.

See "Witnesses."
Questions of fact for jury, see "Trial," § 1.

*As to particular facts or issues.*

Insolvency, see "Bankruptcy," § 3.

*In actions by or against particular classes of persons.*

See "Carriers," § 3.

*In particular civil actions or proceedings.*

See "Collision," § 3; "Conspiracy," § 1.
For breach of contract, see "Contracts," § 5.
For compensation of agent, see "Principal and Agent," § 1.
For loss of or injury to tow, see "Towage."
For personal injuries, see "Carriers," § 3.
On insurance policy, see "Insurance," § 3.
To quiet title to mining claim, see "Mines and Minerals," § 1.

*In criminal prosecutions.*

Against bank officer, see "Banks and Banking," § 2.

**§ 1. Presumptions.**

The legal presumption is that parties to contracts valid on their faces intend in good faith to perform them. One who would avoid his contracts and escape their obligations by his own wrong should establish it by clear proof. A speculator dealt in about 14,000,000 bushels of grain, and less than 2 per cent. of it was delivered. He made contracts valid on their faces for the purchase of grain for future delivery through brokers who were members, respectively, of the Board of Trade of Chicago or of the Merchants' Exchange of St. Louis and became indebted to them for balances of account. He testified that he did not intend to deliver or to receive any grain under his contracts unless forced to do so in order to prevent his contracts from being closed out under the rules of the board or the exchange. *Held*, this evidence did not establish an illegal intention, because it did not disclose a purpose to settle the obligations of his contracts by paying to, or receiving from, the other parties thereto the differences between the contract prices and the market prices at the times of delivery, but it was consonant with an intention to settle the obligations of his contracts as far as possible by set-off and by ringing off and by the payment of differences in accordance with the rules of the board and to deliver and receive that portion of the contracted grain for which he could not thus settle, and this was not an unlawful intention, and did not render the transactions wagers or void.

—Cleage v. Laidley, 149 Fed. 346.....79 C. C. A. 284

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Proof that one had property of the value of only about $50 and that he owed more than $25,000 in July, and that he paid no part of this indebtedness during the succeeding four months is sufficient evidence that he was insolvent in the following October and December. A condition of insolvency is presumed to continue as long as such conditions usually continue under similar circumstances.
—Cleage v. Laidley, 149 Fed. 346.....79 C. C. A. 284

## EXAMINATION.

Of witnesses in general, see "Witnesses," § 1.

## EXCEPTIONS.

For purpose of review, see "Appeal and Error," § 2; "Criminal Law," § 6.

## EXCEPTIONS, BILL OF.

§ 1. **Nature, form, and contents in general.**
Where, in an action for injuries to a passenger, defendant claimed that certain acts occurring at the trial with reference to the extent of plaintiff's injuries unduly influenced the sympathies of the jury, and applied for a new trial on that ground, but the trial judge in denying a new trial did not specifically find that undue influence and prejudice had in fact occurred, the bill of exceptions on a writ of error should be construed to mean that, while the facts were as stated, the jury were not unduly influenced thereby.
—Illinois Cent. R. Co. v. Warren, 149 Fed. 658.....79 C. C. A. 350

## EXECUTION.

In equity, see "Equity," § 2.

## FEDERAL COURTS.

See "Courts," § 1.
Summoning jury for federal courts, see "Jury," § 1.

## FEDERAL QUESTIONS.

Ground for removal of cause, see "Removal of Causes," § 1.

## FELLOW SERVANTS.

See "Master and Servant," § 1.

## FINAL JUDGMENT.

Appealability, see "Appeal and Error," § 1.

## FORECLOSURE.

Of mortgage, see "Mortgages," § 1.

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## FOREIGN CORPORATIONS.

See "Corporations," § 2.

## FOREIGN JUDGMENTS.

See "Judgment," § 4.

## FORMER ADJUDICATION.

See "Judgment," § 3.

## FRAUD.

Affecting contracts, see "Contracts," § 3.
Relating to public lands, see "Public Lands," § 1.

**§ 1. Actions.**

If the fraud inducing a purchase of property has been waived by laches as a ground for rescission of the contract, and the vendee has not fully performed on his part, he may not, with full knowledge of the vitiating fraud, continue performance, voluntarily subjecting himself to damage, and afterwards recover therefor.

—Richardson v. Lowe, 149 Fed. 625.....79 C. C. A. 317

## FUTURES.

Dealing in futures, see "Gaming," § 1.

## GAMING.

**§ 1. Gambling contracts and transactions.**

Contracts for the purchase and sale for future delivery of grain or other personal property are lawful and valid. But the intention of the parties to such a contract to discharge their obligations under it by the payment by one of the parties to the other of the difference between the contract price and the market price of the commodity sold, and never to make or accept any delivery, renders the agreement a wager and makes it void.

—Cleage v. Laidley, 149 Fed. 346.....79 C. C. A. 284

A sale of a contract for future delivery, or of rights under it, before the time of delivery, is not unlawful. An intention by the parties to such a contract to sell it, or to sell their rights under it before the day of delivery, so that they will not deliver or receive any of the contracted commodity does not make the contract a wager nor avoid it. Ponder v. Jerome Hill Cotton Co., 40 C. C. A. 416, 420, 100 Fed. 373, 377.

—Cleage v. Laidley, 149 Fed. 346.....79 C. C. A. 284

The settlement of the obligations of such contracts by set-off and by ringing off and by paying the differences according to the rules and practice of the Board of Trade of Chicago is not unlawful. The intention of the parties to such contracts to discharge their obligations under them as far as possible by set-off and by ringing off in this way, and to receive or to deliver only that portion of the contracted commodities for which they may be unable to settle in that way, is not illegal, and does not render the contracts or transactions wagers or void. Board of Trade v. Christie Grain & Stock Co., 25 Sup. Ct. 637, 198 U. S. 236, 248, 249, 49 L. Ed. 1031.

—Cleage v. Laidley, 149 Fed. 346.....79 C. C. A. 284

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## GOOD FAITH.

Of purchaser, see "Bills and Notes," § 1.

## GRAND JURY.

See "Indictment and Information."
Pleas and abatement to indictment for defect in, see "Criminal Law," § 2.

Act Cong. May 11, 1858, c. 31 (11 Stat. 285), created the state of Minnesota into one federal judicial district, and Act March 3, 1859, c. 76 (11 Stat. 402 [U. S. Comp. St. 1901, pp. 316, 446]), provided for the holding of terms of court in three different cities. Act April 26, 1890, c. 167, § 1 [U. S. Comp. St. 1901, p. 374], declared that, for the purpose of holding terms of court, the district of Minnesota was divided into six divisions, and section 6 that grand and petit juries should be summoned for each of the terms of such court, and the petit jury should be competent to sit and act as such jury in either the Circuit or District Court at such terms. Act Cong. June 12, 1894, c. 132 (28 Stat. 102), provided that all criminal proceedings instituted for the trial of offenses against the laws of the United States arising in the district of Minnesota shall be brought, had, and prosecuted in the division of the district in which the offenses were committed. *Held*, that a federal grand jury was not required to be drawn from the division of the district in which the offense to be investigated was committed, but might be properly summoned from any portion of the state constituting "the district," regardless of the place where the prosecution was triable.
—Clement v. United States, 149 Fed. 305.....79 C. C. A. 243

## GRANTS.

Of public lands, see "Public Lands."

## GUARANTY.

Power of corporation to guaranty notes, see "Corporations," § 1.

**§ 1. Requisites and validity.**
The making of further loans by a bank to a debtor, at the request of a guarantor, is a sufficient consideration for a guaranty of the prior indebtedness.
—Peters v. Merchants' & Farmers' Bank of Ponchatoula, 149 Fed. 373
79 C. C. A. 193

**§ 2. Construction and operation.**
Defendant became guarantor of loans to be made by plaintiff bank to a third party to the amount of $10,000. When plaintiff had in fact lent such party an amount in excess of $10,000, defendant by telegram and letters authorized a further extension of credit on his guaranty to the extent of $2,000, "making $12,000, all told." It did not appear that he had any knowledge that the amount then owing exceeded the $10,000 guaranteed by him. *Held*, that the second guaranty did not cover such excess, but only such amount as was thereafter lent, not exceeding $2,000.
—Peters v. Merchants' & Farmers' Bank of Ponchatoula, 149 Fed. 373
79 C. C. A. 193

**§ 3. Rights and remedies of guarantor.**
Where a bank, which held a mortgage securing a part of a customer's indebtedness, another part being secured by defendant's guaranty, and still another part being unsecured, obtained a judgment against the principal

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debtor for the whole indebtedness, reserving its right to proceed on the mortgage, the fact that it sold the mortgaged property under an execution on the judgment, instead of foreclosing the mortgage, was not prejudicial to defendant, and did not deprive the bank of the right to apply the proceeds in payment of the mortgage debt; but it was required to apply any surplus pro rata on the entire remaining indebtedness.

—Peters v. Merchants' & Farmers' Bank of Ponchatoula, 149 Fed. 373 79 C. C. A. 193

## HARMLESS ERROR.

In civil actions, see "Appeal and Error," § 7.
In criminal prosecutions, see "Criminal Law," § 6.

## HIGHWAYS.

See "Municipal Corporations," § 1.

## HUSBAND AND WIFE.

§ 1. **Actions.**

A wife cannot, either before or after divorce, maintain an action to recover damages from her husband for his failure to supply her with the necessaries of life, or for any other act or failure of duty connected with or arising from the marital relation.

—Decker v. Kedly, 148 Fed. 681.....79 C. C. A. 305

## IMMIGRATION.

Regulation, see "Aliens," § 1.

## IMPEACHMENT.

Of witness, see "Witnesses," § 2.

## IMPORTS.

Duties, see "Customs Duties."

## INDEMNITY.

See "Guaranty."

## INDIANS.

Rev. St. § 2116, provides that no purchase, grant, lease, or other conveyance of land from any Indian nation or tribe of Indians shall be valid, unless the same be made by treaty or convention entered into pursuant to the Constitution; but Act Cong. March 1, 1889, c. 333, 25 Stat. 784, repealed all laws previously existing intended to prevent the Chickasaw Nation from lawfully making leases for mining coal for a period not exceeding 10 years. *Held*, that leases executed by the national secretary of the Chickasaw Nation, in October, 1890, for the mining of coal and other minerals, were valid, so far as they authorized the mining of coal for a period not exceeding 10 years.

—McBride v. Farrington, 149 Fed. 114.....79 C. C. A. 56

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## INDICTMENT AND INFORMATION.

See "Grand Jury."
Indictment of bank officer, see "Banks and Banking," § 2.
Motion in arrest of judgment for insufficiency of indictment, see "Criminal Law," § 5.

**§ 1. Requisites and sufficiency of accusation.**

Technical accuracy must yield to the fair and obvious meaning of the language employed, when tested by the ordinary rules of construction, and regard must be had to the necessity of punishing the guilty, as well as acquitting the innocent.

—Clement v. United States, 149 Fed. 305.....79 C. C. A. 243

Under U. S. Comp. St. 1901, p. 702, § 1025, providing that, so far as possible, consistent with assuring accused a fair and impartial trial, the court shall disregard form, imperfection of statement, and unimportant defects which do not reasonably tend to prejudice accused, an indictment is sufficiently certain if it alleges facts sufficient to enable accused to make his defense, and to plead the judgment in bar of any further prosecution for the same offense.

—Clement v. United States, 149 Fed. 305.....79 C. C. A. 243

## INDORSEMENT.

Of bill of exchange or promissory note, see "Bills and Notes," § 1.

## INFORMATION.

Criminal accusation, see "Indictment and Information."

## INFRINGEMENT.

Of patent, see "Patents," § 5.
Of trade-mark, see "Trade-Marks and Trade-Names," § 1.

## INJUNCTION.

To protect water rights, see "Waters and Water Courses," § 1.
To restrain unfair competition in trade, see "Trade-Marks and Trade-Names," § 1.

**§ 1. Nature and grounds in general.**

Where defendants had filed an application for a permit to divert water from a stream which had been granted by the state authorities on their furnishing a plan of their proposed works, which plan if carried out would work irreparable injury to the plant of complainant, which was a prior appropriator, and defendants insisted upon their right and affirmed their intention to proceed in accordance with such plans, such facts sufficiently show a purpose and intention to interfere with complainant's water rights to warrant the granting of an injunction to restrain the threatened injury.

—Trade Dollar Consol. Min. Co. v. Fraser, 148 Fed. 585.....
79 C. C. A. 37

The fact that defendants, who claim the right to take water from a stream in accordance with plans approved by the state authorities, in carrying out such plans would be compelled to condemn right of way over the lands of complainant, who is a prior appropriator, will not debar

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complainant from the right to an injunction to restrain the building of such proposed works, where their construction would work irreparable injury to the plant of complainant and destroy the value of its prior water right, since its equitable rights could not be adequately protected in the condemnation proceeding.

—Trade Dollar Consol. Min. Co. v. Fraser, 148 Fed. 585..... 79 C. C. A. 87

**§ 2. Subjects of protection and relief.**

It is a proper exercise of discretion on the part of a Circuit Court to enjoin a receiver of a national bank from transmitting a fund in his hands to the treasurer of the United States pending the determination by the court of a preferential claim thereto.

—American Can Co. v. Williams, 149 Fed. 200.....79 C. C. A. 158

**§ 3. Actions for injunctions.**

A bill to enjoin trespass by the cutting of trees does not state a case within the jurisdiction of equity, where it shows that the trees are forest trees, valuable only for lumber, and there is no allegation that the defendant is insolvent; and a mere allegation that complainant will suffer irreparable injury, without stating facts to support it, is not sufficient.

—Ashburn v. Graves, 149 Fed. 968; Graves v. Crawford, Id..... 79 C. C. A. 478

**§ 4. Preliminary and interlocutory injunctions.**

An order granting a preliminary injunction restraining defendants from inducing complainant's customers to violate their contracts by selling a proprietary medicine manufactured by complainant to defendants, contrary to the terms of their said contracts, considered, and affirmed.

—Wells & Richardson Co. v. Abraham, 149 Fed. 408..79 C. C. A. 228

## IN PAIS.

Estoppel, see "Estoppel," § 1.

## INSOLVENCY.

See "Bankruptcy."

Presumptions as to existence of, see "Evidence," § 1.

## INSURANCE.

**§ 1. The contract in general.**

Deceased applied for insurance in defendant company, and in order to get a reduction in premium requested informally that his application be dated back. At the time of making the application he paid the local agent the premium for the first year, taking a receipt providing that the premium should be returned in case the application should not be accepted. Defendant elected not to accept the application, unless the applicant amended it, formally requesting that the insurance should take effect as of the prior date, and consenting to certain other conditions and for this purpose submitted an amended application, with a policy based thereon, which was sent to its local agent with instructions not to deliver until the applicant signed the amended application and paid certain interest on the first premium. The agent wrote the applicant that the policy had arrived "straight as a string" and that he hoped to deliver the same the following Sunday, but insured died before that time without having received the policy, signed the amended application, or paid the additional premium. *Held*, there was no acceptance by deceased of the insurance company's counter proposition, contained in the amended application, sufficient to constitute a contract of insurance.

—McNicol v. New York Life Ins. Co., 149 Fed. 141...79 C. C. A. 11

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The receipt of a first year's premium from an applicant for life insurance, with the qualification that it was conditional on the acceptance by the insurer of the applicant's proposition for insurance as made in his application, and, if the proposition was not accepted, the money should be returned, did not constitute a contract of insurance.
—McNicol v. New York Life Ins. Co., 149 Fed. 141...79 C. C. A. 11

Defendant insurance company rejected an application for insurance as made, but filled out an amended application and the policy based thereon, and sent the same to its local agent, with instructions not to deliver the policy until insured had signed the amended application and paid the necessary additional premium. The agent wrote the applicant that he had received the policy "straight as a string" and hoped to deliver the same the following Sunday, but the applicant died before signing the amended application or obtaining the policy. *Held*, that the insurance company was not estopped by the letter of the local agent to deny that it had not accepted the applicant's original proposition.
—McNicol v. New York Life Ins. Co., 149 Fed. 141...79 C. C. A. 11

**§ 2. Risks and causes of loss.**
An accident policy recited that it insured against bodily injuries sustained through external, violent, and accidental means, and in a subsequent clause provided that it did not cover death from disability resulting from mineral, animal, vegetable, gaseous, or any other kind of poison, but, subject to its conditions, covered death or disability resulting from septicæmia, etc. *Held*, that the policy did not cover death from septicæmia ensuing from a surgical operation for appendicitis.
—Herdic v. Maryland Casualty Co., 149 Fed. 198....79 C. C. A. 156

**§ 3. Actions on policies.**
Evidence which warrants a finding that the property of a corporation plaintiff was willfully burned by its president, who had full control of its affairs and was the owner of practically all of its stock, the remainder being owned by members of his family; that the business was on the decline, the lease about to expire, and the property overinsured; and that the overvaluation was participated in by other members of the family—is sufficient to charge the corporation with the act of incendiarism, and to constitute a defense to an action to recover the insurance.
—Melly Co. v. London & Lancashire Fire Ins. Co., 148 Fed. 683..... 79 C. C. A. 454

Where an employer's liability policy provided that an action thereon should be barred unless commenced within 30 days after the right of action accrued, but the insurer participated in negotiations for a settlement for a period of more than 90 days after the 30-day limitation had expired, the contract limitation was absolutely waived, so that on the termination of the negotiations for settlement the insured was only required to proceed within the statutory period to enforce its claim.
—Lynchburg Cotton Mill Co. v. Travelers' Ins. Co. of Hartford, Conn., 149 Fed. 954.....79 C. C. A. 464

Where, in an action on an employer's liability policy, it was claimed that the suit was barred by a 30-day limitation clause, certain correspondence between insured and the local and state agents of the defendant company and between such agents themselves regarding the adjustment of the claim, which was a mere continuance of the same adjustment which the company admitted to have been conducting for 90 days after the 30-day limitation had expired, was admissible as bearing on the issue of waiver of such contract limitation.
—Lynchburg Cotton Mill Co. v. Travelers' Ins. Co. of Hartford, Conn., 149 Fed. 954.....79 C. C. A. 464

## INTENT.

Element of larceny, see "Larceny," § 1.

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## INTEREST.

Effect as to credibility of witness, see "Witnesses," § 2.

## INTERLOCUTORY INJUNCTION.

See "Injunction," § 4.

## INTERLOCUTORY JUDGMENT.

Appealability, see "Appeal and Error," § 1.

## INTERNATIONAL LAW.

See "Aliens."

## INTERSTATE COMMERCE.

Regulation, see "Carriers," § 1.

## INVENTION.

See "Patents."

## IRREPARABLE INJURY.

Ground for relief by injunction, see "Injunction," § 1.

## JUDGES.

See "Courts."

## JUDGMENT.

Decree in equity, see "Equity," § 2.
On appeal or writ of error, see "Appeal and Error," § 8.
Review, see "Appeal and Error."

§ 1. **Entry, record, and docketing.**

Where the clerk neglected to enter judgment pursuant to the direction of the court during the term, he had no power thereafter to enter judgment nunc pro tunc.

—Pressed Steel Car Co. v. Steel Car Forge Co., 149 Fed. 182..... 79 C. C. A. 130

Circuit Court rule 16, providing that, where judgment shall be omitted to be entered on a verdict, it shall be considered as entered on the last day of the term, is applicable only to a verdict which is sufficient to support a judgment.

—Pressed Steel Car Co. v. Steel Car Forge Co., 149 Fed. 182..... 79 C. C. A. 130

§ 2. **Collateral attack.**

Where, after a debtor had been adjudged a bankrupt, he recognized the validity of the adjudication, and applied for a discharge from his debts, and there was no appeal taken, the adjudication was not subject to collateral attack because of a defect in the petition, in a proceeding against the bankrupt for taking a false oath.

—Edelstein v. United States, 149 Fed. 636.....79 C. C. A. 328

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Where judgments are rendered in bankruptcy proceedings on questions arising therein, they possess all the incidents and qualities of finality and conclusiveness appertaining to judgments of courts of general jurisdiction, and, unless reversed on appeal or writ of error, import absolute verity.

—Edelstein v. United States, 149 Fed. 636.....79 C. C. A. 328

**§ 3. Merger and bar of causes of action and defenses.**

Plaintiffs, having conveyed the timber on certain land in 1893–94, without fixing a time for the removal thereof, instituted a suit in 1901 against defendant which had acquired such timber rights to restrain it from removing the timber, on the theory that defendant was only entitled to a reasonable time to remove the same, which had then elapsed. The bill prayed that, in case a reasonable time had not elapsed, the court should fix a time within which the timber should be removed. The state Supreme Court, reversing a decree sustaining complainant's contention that a reasonable time had elapsed, *held* that, under the evidence disclosed, a reasonable time would not elapse until November 1, 1903, and dismissed complainant's bill. *Held* that, though the decision fixing the time was contained only in the state court's opinion and not in its decree, it was, nevertheless, within the issues tendered by the bill, and was res judicata of complainant's right to recover the value of timber cut from the land by defendant prior to the date so fixed.

—Carson v. Three States Lumber Co., 149 Fed. 377...79 C. C. A. 197

The acquittal of a defendant indicted under section 12 of Act March 3, 1899, 30 Stat. 1151 [U. S. Comp. St. 1901, pp. 3541, 3542], for creating an obstruction in a navigable stream, in violation of section 10 of said act, is not a bar to a subsequent suit in equity brought by the United States under the same section against the same defendant to compel the removal of such obstruction; the issues and measure of proof required in the two proceedings not being the same.

—United States v. Donaldson-Schultz Co., 148 Fed. 581.....
79 C. C. A. 403

**§ 4. Foreign judgments.**

Under article 4, § 1, of the federal Constitution, requiring that full faith and credit shall be given to the judicial proceedings of another state, in order that a judgment or decree shall be conclusive in an action brought thereon in another state, it must not only be conclusive in the jurisdiction where rendered, but also final in character, and establish a fixed and certain liability; and a decree for alimony and costs will support an action in another state in so far as it is for a sum due at the time of its rendition, and which is absolutely awarded, but not with respect to future payments, for which it provides, but as to which it remains subject to modification at any time, in the discretion of the court.

—Israel v. Israel, 148 Fed. 576.....79 C. C. A. 32

## JURISDICTION.

Of criminal prosecutions, see "Criminal Law," § 1.
Of particular courts, see "Courts."

## JURY.

See "Grand Jury."
Questions for jury in civil actions, see "Trial," § 1.
Taking case or question from jury at trial, see "Trial," § 1.
Verdict in civil actions, see "Trial," § 3.
Verdict in criminal prosecutions, see "Criminal Law," § 4.



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**§ 1. Summoning, attendance, discharge, and compensation.**

Act Cong. April 26, 1890, c. 167, § 1 [U. S. Comp. St. 1901, p. 374], divides the judicial district of Minnesota into six divisions, and section 6 provides that the grand and petit juries shall be summoned for each of the terms of Circuit or District Court, and that the petit jury shall be competent to sit and act as such jury in either of such courts. Act June 12, 1894, c. 132, 28 Stat. 102, requires all criminal proceedings instituted for the trial of offenses against the United States arising in the district of Minnesota to be brought, had, and prosecuted in the division of the district in which the offenses were committed. U. S. Comp. St. 1901, p. 455, § 563, confers on District Courts of the United States jurisdiction of all crimes and offenses cognizable under the authority of the United States committed within their districts, and Const. Amend. 6, declares that in all criminal proceedings the accused shall enjoy the right to a trial by a jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. *Held*, that a petit jury for the trial of federal offenses arising in Minnesota might be properly summoned from any portion of the state, and that accused was not entitled to a jury exclusively summoned from the division of the district in which he was triable.

—Clement v. United States, 149 Fed. 305.....79 C. C. A. 243

## KNOWLEDGE.

By servant of defects causing injury, see "Master and Servant," § 1.

## LACHES.

In rescinding contract for sale of realty, see "Vendor and Purchaser," § 1.

## LANDLORD AND TENANT.

Lease of Indian mineral lands, see "Indians."
Lease of property belonging to bankrupt's estate, see "Bankruptcy," § 2.

## LANDS.

See "Public Lands."

## LARCENY.

Appellate jurisdiction of Circuit Court of Appeals to review conviction for, see "Courts," § 1.
Harmless error, see "Criminal Law," § 6.
Impeachment of witness, see "Witnesses," § 2.

**§ 1. Prosecution and punishment.**

Where a territorial statute defined larceny as a taking with a felonious intent to deprive the owner of the property taken, and with intent to appropriate the same to the use and benefit of the taker, an instruction authorizing a conviction if the property was taken by defendant with the felonious intent to deprive the owner thereof was erroneous.

—Miller v. Territory of Oklahoma, 149 Fed. 330.....79 C. C. A. 268

## LETTERS PATENT.

For inventions, see "Patents."

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## LIBEL.

In admiralty, see "Admiralty," § 1.

## LIBEL AND SLANDER.

§ 1. **Privileged communications, and malice therein.**

The publication of a statement that a person has been arrested on a criminal charge is not actionable if the statement is true, but if there is added to it by way of comment words which amount to an accusation that the charge is true, or comment which assumes the guilt of the person arrested, by headlines or otherwise, the mere fact that the person was arrested on the charge stated is no justification for the words imputing guilt.

—Commercial Pub. Co. v. Smith, 149 Fed. 704.....79 C. C. A. 410

§ 2. **Actions.**

A publication must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it, and the whole, including display lines, should be read and construed together, and its meaning and signification thus determined. When so read, if it is so unambiguous as to reasonably bear but one interpretation, it is for the judge to say whether it is defamatory or not; but if it is capable of two meanings, one of which would render it libelous and actionable and the other not, it is for the jury to say, under all the circumstances surrounding its publication, including extraneous facts admissible in evidence, which of the two meanings would be attributed to it by those by whom it might be read.

—Commercial Pub. Co. v. Smith, 149 Fed. 704.....79 C. C. A. 410

An item published by defendant in its newspaper, under the heading "Murderer Arrested," stated that a sheriff had arrested the plaintiff, who was wanted in another state for the murder of a man, the incentive being robbery; that rewards had been there offered for plaintiff's arrest; that he did not deny being the man wanted, but claimed that he did not do the killing. In an action for libel because of such publication, the declaration admitted that plaintiff was arrested as therein stated, and alleged by innuendo that the article charged plaintiff with murder, and that rewards had been offered for his arrest, which statements were false and untrue; that plaintiff had been injured thereby, etc. *Held*, that the question whether the article would be understood by readers to so charge, and was therefore libelous, was one for the jury, and that the court erred in charging that it was libelous per se.

—Commercial Pub. Co. v. Smith, 149 Fed. 704.....79 C. C. A. 410

## LICENSES.

For making use, or sale of patented articles, see "Patents," § 4.

## LIENS.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 3.
Of bank on special deposit, see "Banks and Banking," § 1.
Salvage liens, see "Salvage," § 3.

## LIFE INSURANCE.

See "Insurance," § 1.

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## LIMITATION OF ACTIONS.

Against United States, see "United States," § 2.

## LIQUIDATED DAMAGES.

See "Damages," § 2.

## LOANS.

By bank, see "Banks and Banking," § 1.

## LOCATION.

Of mining claim, see "Mines and Minerals," § 1.

## MACHINERY.

Liability of employer for defects, see "Master and Servant," § 1.

## MANDATE.

To lower court on decision on appeal or writ of error, see "Appeal and Error," § 8.

## MANUFACTURES.

Supply of water for manufacturing purposes, see "Waters and Water Courses," § 1.

## MARITIME LIENS.

For salvage, see "Salvage," § 3.

## MARRIAGE.

See "Husband and Wife."

## MARRIED WOMEN.

See "Husband and Wife."

## MARSHALING ASSETS AND SECURITIES.

Between guarantor and creditor, see "Guaranty," § 5.

## MASTER AND SERVANT.

Alien contract labor, see "Aliens," § 1.
Employers' liability insurance, see "Insurance," § 3.
Liability of carrier for injury to passenger by servant, see "Carriers," § 3.

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§ 1. **Master's liability for injuries to servant.**

Plaintiff, a brakeman, while in defendant's employ, was struck by a switch target and thrown to the ground from a moving freight car while he was climbing up the ladder to release a brake, with his back to the switch. The switch had been changed shortly before, and plaintiff testified that he had no knowledge of its dangerous proximity to the track and had never been warned concerning the same. *Held*, that the danger from such structure was not one of the ordinary risks which plaintiff assumed.

—Boston & M. R. Co. v. Gokey, 149 Fed. 42.....79 C. C. A. 64

A railroad employé, working constantly with an engine in the yards, may not close his eyes to obvious and dangerous conditions or defects therein, and recover for an injury resulting therefrom; but, if an accident occurs, and he pleads ignorance, he must show that his ignorance was not only actual, but excusable.

—Williams v. Choctaw, O. & G. R. Co., 149 Fed. 104..79 C. C. A. 146

Plaintiff was foreman of a switching crew, working with an engine in railroad yards, and had used the same engine for a month, when he slipped from the footboard at the rear of the tender, at night, and was injured. It appeared that the footboard was defective, in that it sloped downward, and was also icy that night by reason of the leaking of the tank. Such defects had existed for some time, and plaintiff had worked with the engine every day, and had ridden on the footboard. The engine was backing, making the position one of danger, and plaintiff was not compelled to occupy it at the time, but took it for greater convenience. *Held*, that he was chargeable with knowledge of the defects which he ought to have possessed in the exercise of ordinary care and observation, and was guilty of contributory negligence which precluded him from recovering for the injury.

—Williams v. Choctaw, O. & G. R. Co., 149 Fed. 104..79 C. C. A. 146

Where, in an action for injuries to a brakeman by his foot becoming caught in an unblocked frog, there was undisputed proof that on some of the railroad systems in the state and elsewhere it was customary to leave frogs unblocked, and on others to block them, and the frogs on some parts of defendant's lines were blocked and on others not, and also that there was a fair difference of opinion among practical railroad men as to which was the safer practice, defendant's failure to block the frog in question did not constitute actionable negligence.

—Wabash R. Co. v. Kithcart, 149 Fed. 108.....79 C. C. A. 150

Decedent, an employé in a sawmill, before operations had commenced in the morning, took a position on the sawyer's side of the pulleys over which the band saw was operated, practically in front of the saw, and within two feet of it while it was being run at a high rate of speed. Decedent placed his left foot on the rail of the carriage track, and his right foot was raised and resting on a lower extension of the guard plank, his back being toward the log carriage. In this position plaintiff endeavored to clean sawdust from the upper pulley with a stick, and while doing so, the log carriage, the mechanism of which was defective, noiselessly crept up from behind him unobserved, and before he could escape, forced his body against the teeth of the saw, by which he was instantly killed. Decedent had knowledge of, and had complained of the creeping motion of the carriage, and had received a promise of repair two or three days before the accident; but, while standing in the position he occupied, he took no precautions to ascertain whether the carriage was still. The position that decedent took to clean the pulley was peculiar to him, and he could easily have occupied a different position where he would have been perfectly safe from the danger. *Held*, that decedent was guilty of contributory negligence, as a matter of law.

—Crookston Lumber Co. v. Boutin, 149 Fed. 680....79 C. C. A. 368

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Where a master was engaged in operating a steam sawmill, it owed a duty to its employés to exercise all reasonable care to provide them with suitable and reasonably safe machinery and instrumentalities with which to perform their work.

—Crookston Lumber Co. v. Boutin, 149 Fed. 680....79 C. C. A. 368

Where decedent, a sawmill employé, gave notice to defendant of a defect in the log carriage, and secured a promise from the superintendent of the mill to repair the same, decedent did not assume the risk of injury caused by the defect in the carriage in continuing to work for a time thereafter reasonably sufficient to enable defendant to repair the carriage, unless the risk was so obviously and imminently dangerous that a person of ordinary prudence would not have taken it.

—Crookston Lumber Co. v. Boutin, 149 Fed. 680....79 C. C. A. 368

That decedent, a sawmill employé, gave notice to defendant of the defective condition of a log carriage, and secured a promise to repair, did not relieve him from the necessity of exercising reasonable care for his own safety in performing his duties, nor deprive the defendant of the defense of contributory negligence in case decedent failed to do so and was injured.

—Crookston Lumber Co. v. Boutin, 149 Fed. 680....79 C. C. A. 368

Where the repair of a log carriage mechanism in a sawmill would probably have involved a reconstruction of the valves leading into the carriage cylinder, and have required a general overhauling of the mill under and on which the connections between the boiler and the carriage were located, and an employé complained of a defect in the carriage, and obtained a promise of repair, it was the height of recklessness for him to presume, in the absence of any evidence that such repairs were in progress, that they had been made two or three days after the promise was given.

—Crookston Lumber Co. v. Boutin, 149 Fed. 680....79 C. C. A. 368

If the building of stagings and scaffolds is not within the duty of a servant who may have to use them in doing his work, and if he has no hand in erecting them, he is not a party to the negligence of those servants to whom the master assigns the duty of providing such appliances, and he may recover from the master for an injury resulting from their negligent construction.

—Thompson-Starrett Co. v. Fitzgerald, 149 Fed. 721..79 C. C. A. 427

**§ 2. —— Actions.**

Plaintiff, a brakeman, while in defendant's employ, was struck by a switch target and thrown to the ground from a moving freight car while he was climbing up the ladder to release a brake with his back to the switch. The switch had been changed shortly before, and plaintiff testified that he had no knowledge of its dangerous proximity to the track and had never been warned concerning the same. *Held*, that whether plaintiff was guilty of contributory negligence was for the jury.

—Boston & M. R. Co. v. Gokey, 149 Fed. 42.....79 C. C. A. 64

Plaintiff was a brakeman in the service of defendant railroad company, and while engaged in coupling a car on a side track to a train, at night, took hold of the coupling lever of such standing car with one hand while he reached with the other between such car and the approaching car to open the knuckle as was necessary. He then discovered that the chain connecting the pin to the lever was broken so that the pin must be raised by hand which necessitated the use of both hands between the cars. Before he could raise the pin and open the knuckle in that way the cars came together and one hand was crushed. Plaintiff had no previous knowledge of the defect which was due to the negligence of defendant's inspector. *Held*, that the question whether or not plaintiff was chargeable with contributory negligence was one for the jury.

—Baltimore & O. S. W. R. Co. v. Davis, 149 Fed. 191..79 C. C. A. 139

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In an action for injuries, plaintiff, a brakeman, alleged that in complying with the orders of his superior he was compelled, by reason of a defective coupling rod, to step between the cars in order to uncouple them, and while doing so his foot was caught in an open unblocked frog in the track; that the injury was occasioned because of the negligent and careless construction of defendant's track in failing to properly block the frog, and that the accident was solely caused by reason of defendant's negligence in failing to properly construct and maintain its track at the point of the accident. *Held*, that the petition was insufficient to raise an issue of negligence in maintaining a defective coupling appliance.
—Wabash R. Co. v. Kithcart, 149 Fed. 108.....79 C. C. A. 150

In an action for injuries to plaintiff while in the employ of defendant railroad company, caused by the blowing out of a plug which had been placed in the crown sheet of a locomotive on the inside of the fire box, evidence *held* to require submission of the question of defendant's negligence in inserting the plug, etc., to the jury.
—Burton v. Texas & P. Ry. Co., 149 Fed. 388.....79 C. C. A. 208

In an action for the death of a sawmill employé, by being pushed against the saw by the log carriage, the fact that the carriage mechanism was so out of repair that the carriage would creep along the track toward the saw when the controlling lever was in a position intended to keep the carriage at rest was sufficient to present a question for the jury.
—Crookston Lumber Co. v. Boutin, 149 Fed. 680.....79 C. C. A. 368

In the construction of a steel building, the contractor laid a platform of loose planks across the floor beams of the lower floor near an elevator, onto which laborers were required to wheel materials brought in to be sent up on the elevator. A plank on one side extended for several inches over a drop of four inches in the floor beams, and when plaintiff, who was one of such laborers, stepped on it the plank tipped and threw him and his barrow into the cellar causing his injury. *Held*, that the question of the contractor's negligence and failure in its duty to provide its employés with a reasonably safe place to work was properly submitted to the jury, in an action to recover for the injury, the projection of the plank without support not being obvious to one on the platform.
—Thompson-Starrett Co. v. Fitzgerald, 149 Fed. 721..79 C. C. A. 427

In the construction of a steel building the contractor laid a platform of loose planks across the floor beams of the lower floor near an elevator onto which laborers were required to wheel materials brought in to be sent up on the elevator. A plank on one side extended for several inches over a drop of four inches in the floor beams, and when plaintiff, who was one of such laborers, stepped on it, the plank tipped and threw him and his barrel into the cellar, causing his injury. *Held*, that the question of plaintiff's contributory negligence was properly submitted to the jury, in an action to recover for the injury; the projection of the plank without the support not being obvious to one on the platform.
—Thompson-Starrett Co. v. Fitzgerald, 149 Fed. 721..79 C. C. A. 427

A judgment on a verdict for plaintiff in an action by a servant against the master to recover damages for a personal injury in which the defense was the assumption of risk by plaintiff affirmed.
—American Tin Plate Co. v. Smith, 149 Fed. 733.....79 C. C. A. 439

## MEDICAL TREATMENT.

Of seamen, see "Seamen."

## MINES AND MINERALS.

Lease of Indian mineral lands, see "Indians."

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§ 1. **Public mineral lands.**

Plaintiff located certain gold placer mining claims along a creek in Alaska, and before doing so washed on each a few pans of the sediment deposited along the sides of the creek, and in each found small particles or colors of gold. Placer gold in paying quantities had been found on the bed rock on a tributary to the creek, and within a mile of such locations, and the bed rock at the place of the locations was from 125 to 150 feet below the surface. Plaintiff and other experienced miners testified that the gold found was sufficient to reasonably justify the investment of money to sink shafts. *Held*, that there was a sufficient discovery to support the locations as against another mineral claimant.

—Lange v. Robinson, 148 Fed. 799.....79 C. C. A. 1

The object of the law in requiring a discovery to precede the location of a mining claim is to insure good faith on the part of the locator and prevent frauds upon the government, and to constitute a discovery which will support the location of a gold placer claim as against another mineral claimant it is not necessary that gold should have been found thereon in paying quantity, but there must have been such a discovery of gold as gives reasonable evidence that the ground is valuable for placer mining, taking into consideration its character, location, and surroundings.

—Lange v. Robinson, 148 Fed. 799.....79 C. C. A. 1

A plaintiff who was living in a tent on one of a number of adjoining mining claims owned by him, and had commenced the sinking of a shaft thereon, had sufficient possession to entitle him to maintain a suit under Alaska Code of June 6, 1900, c. 786, 31 Stat. 321, against an adverse claimant of the ground.

—Lange v. Robinson, 148 Fed. 799.....79 C. C. A. 1

In a suit to quiet title to a mining claim, evidence *held* insufficient to establish that the persons under whom defendants claimed title to the ground under a prior location had performed the assessment work required by Rev. St. 1878, § 2324, c. 6, so as to hold the ground against plaintiff's subsequent location.

—First Nat. Gold Min. Co. of New York & Colorado v. Altvater, 149 Fed. 398.....79 C. C. A. 213

## MISREPRESENTATION.

See "Fraud."

## MONEY RECEIVED.

Recovery of payment in general, see "Payment," § 1.

## MORTGAGES.

§ 1. **Foreclosure by action.**

In a suit in equity to foreclose a mortgage given to secure a note for purchase money of property, an answer setting up fraud inducing the sale in defense to the note and a cross-bill for rescission of the contract on account of the same fraud are not inconsistent.

—Richardson v. Lowe, 149 Fed. 325.....79 C. C. A. 317

## MOTIONS.

Arrest of judgment in criminal prosecutions, see "Criminal Law," § 5.
Direction of verdict in civil actions, see "Trial," § 1.

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## MUNICIPAL CORPORATIONS.

Right of street railroad to cross railroad, see "Railroads," § 1.
Street railroads, see "Street Railroads."

§ 1. **Use and regulation of public places, property, and works.**
The plenary powers given to city councils as governmental agencies of the state by City & Village Act Ill. c. 24, § 62 (Hurd's Rev. St. 1905), to regulate the use of the streets of the city, to permit their use by street railroads, and regulate the crossing of streets by railroads, includes power to authorize the crossing of a railroad track over a street by a street railroad; and such power is not taken away or affected by Act July 1, 1889, p. 223, 3 Starr & C. Ann. St. Ill. c. 114, par. 112, p. 3292, creating the State Railroad and Warehouse Commission, with power to prescribe the place where, and the manner in which, one railroad company may cross with its tracks the tracks of another company.
—East St. Louis Ry. Co. v. Louisville & N. R. Co., 149 Fed. 159..... 79 C. C. A. 107

## NAMES.

See "Trade-Marks and Trade-Names."

## NATIONAL BANKS.

See "Banks and Banking," § 2.

## NAVIGABLE WATERS.

See "Waters and Water Courses"; "Wharves."
Acquittal under indictment for obstruction of navigable stream as bar to action by government to compel removal of obstruction, see "Judgment," § 3.

## NAVIGATION.

Rules for preventing collisions, see "Collision," § 1.

## NECESSARIES.

Liability of husband for necessaries furnished wife, see "Husband and Wife," § 1.

## NEGLIGENCE.

Causing death, see "Death," § 1.
Injuries from as creating liability against estate of bankrupt, see "Bankruptcy," § 6.
Necessity and subject-matter of instructions as to contributory negligence, see "Trial," § 2.

*By particular classes of persons.*

See "Carriers," § 3; "Railroads," § 2; "Street Railroads," § 1.
Carriers by vessel, see "Shipping," § 1.
Employers, see "Master and Servant," § 1.

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*Condition or use of particular species of property, works, machinery, or other instrumentalities.*

See "Railroads," § 2; "Street Railroads," § 1; "Wharves."
Tugs, see "Towage."
Vessels, see "Seamen."

*Contributory Negligence.*

Of passenger, see "Carriers," § 3.
Of servant, see "Master and Servant," § 1.
Of person injured by operation of street railroad, see "Street Railroads," § 1.

**§ 1. Actions.**

In an action by a mother to recover for the death of her son, 12 years old, by falling from a boat on which he was a passenger with her, through the alleged negligence of the defendant, which was operating the boat, an instruction that plaintiff was bound to exercise ordinary care for the safety of her son, and if she failed to do so, "and her failure in any way contributed" to her son's loss, she could not recover, was properly refused, as covering any negligence of plaintiff which may have contributed to her son's death however remotely.

—Coney Island Co. v. Dennan, 149 Fed. 687.....79 C. C. A. 375

## NEGOTIABLE INSTRUMENTS.

See "Bills and Notes."

## NEWLY DISCOVERED EVIDENCE.

Ground for bill of review, see "Equity," § 3.

## NOTES.

Promissory notes, see "Bills and Notes."

## NOTICE.

Affecting employers, see "Master and Servant," § 1.
Affecting purchaser of bill or note, see "Bills and Notes," § 1.
Of rescission of contract of sale, see "Sales," § 2.

## NUNC PRO TUNC.

Entry of judgment nunc pro tunc, see "Judgment," § 1.

## OBJECTIONS.

For purpose of review, see "Appeal and Error," § 2; "Criminal Law," § 6.

## OFFER.

Of reward, see "Rewards."

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## OFFICERS.

Estoppel by act of, see "Estoppel," § 1.
Suit against United States officers as ground for removal of cause to federal court, see "Removal of Causes," § 1.
United States officers, see "United States," § 1.

## ORDERS.

Granting or refusing preliminary injunction, see "Injunction," § 4.
Review of appealable orders, see "Appeal and Error."

## OVERCHARGE.

By carrier, see "Carriers," § 2.

## PARTIES.

Character ground of jurisdiction, see "Courts," § 1.
In actions for wrongful death, see "Death," § 1.
On appeal or writ of error, see "Appeal and Error," § 3.

## PARTNERSHIP.

Bankruptcy of, see "Bankruptcy," § 6.
Liability as indorser of note, see "Bills and Notes," § 1.
Parties on appeal in action against partners, see "Appeal and Error," § 3.

**§ 1. Rights and liabilities as to third persons.**

In an ordinary trading partnership, a partner has implied authority to borrow money on the credit of the firm.

—Union Nat. Bank of Kansas City, Mo., v. Neill, 149 Fed. 711..... 79 C. C. A. 417

In an ordinary trading partnership, a partner has implied authority to draw and accept, make, and indorse bills of exchange and notes in the name of the firm. In re A. F. Hardie & Co. (D. C. 1906) 143 F. 553, reversed.

—Union Nat. Bank of Kansas City, Mo., v. Neill, 149 Fed. 711..... 79 C. C. A. 417

## PASSENGERS.

See "Carriers," § 3.

## PATENTS.

Consideration of contract to assign, see "Contracts," § 1.
Construction of contract as to right to invention, see "Contracts," § 2.

**§ 1. Patentability.**

The Reynolds & Jacobs patent, No. 435,613, for a book-sewing machine for sewing the signatures of books together, claims 3 and 15, which are broad claims, covering a combination of detail parts not specifically described, except that they are adjustable, and the sewing devices generally arranged in groups, if given the broad construction imported by their

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terms, are void for lack of patentable novelty, in view of the prior art: the only novel feature being such adjustability.

—Smyth Mfg. Co. v. Sheridan, 149 Fed. 208.....79 C. C. A. 166

Merely making the parts of a machine adjustable with respect to each other does not constitute invention, but is within the ordinary ingenuity of a skilled mechanic.

—Smyth Mfg. Co. v. Sheridan, 149 Fed. 208.....79 C. C. A. 166

A patent will not be held void for anticipation by an unpatented machine on the oral testimony of witnesses, the accuracy of which depends upon their unaided recollection of events which occurred 25 years previously, unless it is exceptionally clear and convincing.

—United Shirt & Collar Co. v. Beattie, 149 Fed. 736..79 C. C. A. 442

A patent for a successful machine is not void for anticipation, because a prior machine intended for a different purpose may possibly be capable of use as an inefficient substitute for the later machine.

—United Shirt & Collar Co. v. Beattie, 149 Fed. 736..79 C. C. A. 442

The conversion of an abandoned machine, which was a failure, into one which is operative and successful, by the introduction of new and ingenious features, however simple, constitutes invention, which may be protected by a patent.

—United Shirt & Collar Co. v. Beattie, 149 Fed. 736..79 C. C. A. 442

While utility is not necessarily a test of invention, it may help to determine the question, increased efficiency being accepted as an important factor, and it is also regarded as significant that there has been a recognized need of such a machine as that of the patent, and that the efforts of others to meet it have been without success which the patentee has attained only after continued experiment.

—American Caramel Co. v. Thomas Mills & Bro., 149 Fed. 743.....
79 C. C. A. 449

A patent is not invalidated because a machine like that of the patent was made and used by the patentee more than two years before the application was filed, where such use was for the purpose of experiment only, nor is such use a public use, which will defeat the patent because the product of the machine during the time was sold.

—American Caramel Co. v. Thomas Mills & Bro., 149 Fed. 743.....
79 C. C. A. 449

**§ 2. Persons entitled to patents.**

The right of one who conceives an invention to patent the same as the sole inventor is not lost because he lacks the mechanical skill to embody his invention in a machine, and employs another to construct such machine.

—United Shirt & Collar Co. v. Beattie, 149 Fed. 736..79 C. C. A. 442

**§ 3. Applications, and proceedings thereon.**

When the novelty of an invention consists in the dimensions or the material of the new thing devised, the patentee must specify the particular dimensions or the particular material his invention contemplates.

—Bullock Electric Mfg. Co. v. General Electric Co., 149 Fed. 409....
79 C. C. A. 229

**§ 4. Title, conveyances, and contracts.**

Plaintiff executed an unassignable license, authorizing B. to use certain patents on dredging machines which had been installed on a hydraulic dredge known as the "West Superior"; B. agreeing to pay specified royalties therefor. B. thereafter applied to have the license made assignable, and for reduction of the royalty rate, which plaintiff refused to do unless B. paid certain interest on past-due royalties and equipped another dredge of a specified capacity. B. performed neither of these conditions, but later purchased a dredge containing certain of the patented inventions which had been emancipated from further payment of royalties, but which was scarcely half the capacity required by plaintiff

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in his offer to reduce, after which both B. and his executrix paid royalties at the reduced rate until the executrix transferred all the dredges, licenses, etc., to defendant corporation with plaintiff's consent. *Held*, that there was no valid contract for the reduction of the royalty rate, and that defendant was therefore liable only for royalties on the work
—Bowers v. Lake Superior Contracting & Dredging Co., 149 Fed. 983
79 C. C. A. 493

A license to use a patented invention that does not contain words importing assignability is a grant of a mere personal right to the licensee, which does not pass to the licensee's heirs or representatives, and which cannot be transferred to another without the express consent of the licensor.
—Bowers v. Lake Superior Contracting & Dredging Co., 149 Fed. 983
79 C. C. A. 493

A continuing assignable quality may be given to a license to use a patented invention originally unassignable, by facts and circumstances and the conduct of the parties during the continuance of the license.
—Bowers v. Lake Superior Contracting & Dredging Co., 149 Fed. 983
79 C. C. A. 493

Plaintiff executed a license authorizing B. to use certain patented inventions in connection with a hydraulic dredge, on payment of certain royalties. This license was not assignable, and after certain royalties had become due and were unpaid B. requested certain changes in the contract, including the insertion of words authorizing an assignment, which plaintiff agreed to make on B. sending a draft for the royalties then due, with accrued interest. B. did not pay such interest, however, and was never notified that it had been waived, but on B.'s death his executrix continued to operate the dredge and another dredge purchased, which, also, contained certain of the patented inventions, and paid royalties thereon, after which she transferred the dredges to defendant corporation under a bill of sale passing the entire dredging plant, business, and contracts, and all licenses to practice or enjoy patented inventions, together with the license papers. Defendant, with knowledge that executrix had been operating under the license and that she asserted a right to transfer and had made manual delivery thereof, continued to operate the dredge and patented appliances without disavowal of responsibility, or repudiating responsibility for royalties, which plaintiff thereafter demanded. *Held*, that defendant should be regarded as a licensee and as such was liable for royalties.
—Bowers v. Lake Superior Contracting & Dredging Co., 149 Fed. 983
79 C. C. A. 493

The acknowledgment of an assignment of a patent relates to the date of the assignment.
—Murray Co. v. Continental Gin Co., 149 Fed. 989....79 C. C. A. 499

**§ 5. Infringement.**

The question of the validity of a patent on its face may be raised by demurrer in an action at law for its infringement.
—Thomas v. St. Louis & S. F. R. Co., 149 Fed. 753....79 C. C. A. 89

The defense of anticipation will not be considered in a suit for infringement of a patent where it is supported by the introduction of a number of prior patents for complicated machinery without any explanatory testimony.
—Bell v. MacKinnon, 149 Fed. 205.....79 C. C. A. 163

Patents set up in the answer in a suit for infringement as a part of the prior art, printed and indexed in the record on appeal, and referred to in the briefs, and in relation to which witnesses were examined, all without objection, will not be excluded from consideration by the Appellate Court because they were not formally marked as exhibits by the examiner.
—Smyth Mfg. Co. v. Sheridan, 149 Fed. 208.....79 C. C. A. 166

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Where a patented device is obviously operative and useful, the fact that it has never been manufactured by the owner of the patent does not affect his right to maintain a suit for infringement.

—United States Fastener Co. v. Bradley, 149 Fed. 222..... 79 C. C. A. 180

A decree for infringement of a patent will not be reversed on appeal, because the proof shows that the infringing machine was sold by a concern doing business under a different name and style from that of the partnership of defendants as alleged in the bill, where it also fairly shows that the defendants were the proprietors of such concern, and the fact that they made the sale was not contested in the trial court.

—United Shirt & Collar Co. v. Beattie, 149 Fed. 736...79 C. C. A. 442

**§ 6. Decisions on the validity, construction, and infringement of particular patents.**

The Schulze-Berge patent, No. 411,131, and the Caldwell patent, No. 442,855, both for furnaces for reheating or fire-finishing glassware, as limited by construction in prior suits to the precise mechanism described, *held* not infringed by a furnace which does not have a laterally projecting floor, which is an essential feature of both.

—National Glass Co. v. United States Glass Co., 149 Fed. 1003..... 79 C. C. A. 513

The Simonds patents, Nos. 449,968 and 449,959, for ball bearings, narrowly construed, as required by the prior art, *held* not infringed.

—Ball Bearing Co. v. Star Ball Retainer Co., 149 Fed. 219..... 79 C. C. A. 177

The Murray patent, No. 472,607, for an improvement in apparatus for elevating, distributing, and feeding seed cotton to gins by pneumatic action, the principal feature of which is an automatic valve produced by the cotton itself whenever it becomes choked in a chute, which shuts off the suction and the delivery of cotton to that particular chute until the stoppage is overcome, was not anticipated, and, while the elements of the machine are old, discloses a new and patentable combination which produces new and decidedly useful result. Also *held* infringed as to claims 1, 2, 9, and 12.

—Murray Co. v. Continental Gin Co., 149 Fed. 989....79 C. C. A. 499

The Reist patent, No. 508,637, for an improvement in armature cores designed to secure ample ventilation by the use of metal separators between the sections of laminæ of which the core is built up, discloses merely a carrying forward of the idea of prior devices by the use of the same means changed only in form or degree which did not involve invention; it is also void for insufficiency of description of the separators in respect to their thickness, form, and composition to differentiate them from those of the prior art, being described in the specification merely as "thin" and of "metal."

—Bullock Electric Mfg. Co. v. General Electric Co., 149 Fed. 409.... 79 C. C. A. 229

The Tileston patent, No. 513,608, for a flexible ventilated eye-guard, is void for anticipation.

—Tileston v. Vaughan, 149 Fed. 999.....79 C. C. A. 509

The Hershey patent, No. 532,554, for a machine for cutting candy, covers a combination which was new, although the elements were old, and discloses patentable invention; the machine being of greater efficiency than any of the several which preceded it in the art. Also *held* valid as against the claim of prior public use, and infringed.

—American Caramel Co. v. Thomas Mills & Bro., 149 Fed. 743..... 79 C. C. A. 449

The Thomas patent, No. 570,148, for a lateral support for the sides and ends of cars, consisting of truss rods extending from the stakes on the

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outer sides and ends of the car to a plate beneath the car, is void on its face for lack of patentable novelty.
—Thomas v. St. Louis & S. F. R. Co., 149 Fed. 753....79 C. C. A. 89

The Pringle patent, No. 580,000, claim 1, for a separable button catch, designed for use with a stud member, to form a separable button or fastener, was not anticipated, and discloses patentable invention. Also *held* infringed.
—United States Fastener Co. v. Bradley, 149 Fed. 222.....
79 C. C. A. 180

The Bell patent, No. 599,438, for a knitted fabric, if conceded patentable novelty, is of very narrow scope, and is not infringed by a fabric which has neither the groups of short and long loops of plush thread of the specification, nor the short and long loops of the claim.
—Bell v. MacKinnon, 149 Fed. 205.....79 C. C. A. 163

The Swift patent, No. 622,403, for a cell-case machine for the manufacture of cell cases or fillers for crates used in the transportation of eggs or fruit. Claim 1 is void for lack of novelty and invention in view of the prior art. Claim 19, conceding its validity, *held* not infringed.
—Swift v. Portland Brush & Broom Co., 149 Fed. 216..79 C. C. A. 174

The Motsinger patent, No. 642,869, for a controlling means for spark generators, adapted to maintain a constant speed of a driven shaft in a gas engine by means of a peripheral frictional contact between a driving wheel and a pulley on such shaft, and means whereby the grip of one wheel upon the other is automatically so varied that, though the driving wheel may rapidly change from low to high speed, the speed of the driven pulley will not substantially change, in view of the prior mechanical art in which all the means employed were old, is not a pioneer patent, and must be limited to the substantial construction shown. As so limited *held* not infringed.
—Motsinger Device Mfg. Co. v. Hendricks Novelty Co., 149 Fed. 995..
79 C. C. A. 506

The Murray patent, No. 644,532, for improvements in cotton elevators and gin feeders, is void for anticipation.
—Murray Co. v. Continental Gin Co., 149 Fed. 989....79 C. C. A. 499

The Pine patent, No. 645,871, for a machine for folding the edges of blanks for making cuffs, collars, and like articles, was not anticipated in the prior art, and covers a true combination, although of old elements, which discloses invention; also *held* valid as against the claim that the patentee was not the inventor, and infringed as to the first four claims.
—United Shirt & Collar Co. v. Beattie, 149 Fed. 736..79 C. C. A. 442

The Bates patent, No. 676,084, for an improvement in typographic numbering machines, narrowly construed as required by the prior art, held not infringed.
—Bates Mach. Co. v. Wm. A. Force & Co., 149 Fed. 220.....
79 C. C. A. 178

The Read patent, No. 688,690, for improvements in bed motions for cylinder printing presses, is not for a pioneer invention, and as limited by the prior art *held* not infringed.
—Hoe v. Miehle Printing Press & Mfg. Co., 149 Fed. 213.....
79 C. C. A. 171

The Stuart patents, No. 705,715, for a process of intensifying the luster of silk fiber, and No. 705,716. for a machine for carrying out such process, are both void; the former for anticipation by the Hendrie British patent, No. 10,938 of 1845, and the latter for anticipation by the Brizon French machine, from which that of the patent was copied, and for lack of patentable novelty, in view of the prior art.
—Stuart v. Auger & Simon Silk Dyeing Co., 149 Fed. 748.....
79 C. C. A. 60

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The Taussig design patent, No. 33,633, for a design for a casing for disinfecting apparatus is valid; the attractive appearance of the casing shown rendering it popular with users, notwithstanding original structural defects. Also, *held* infringed.

—West Disinfecting Co. v. Frank, 149 Fed. 423.....79 C. C. A. 359

The Palmer design patent, No. 36,806, for a design for artificial building blocks, showing the upper portion of the block having a rock face and the lower part smooth, is void for anticipation and lack of invention; it being shown without contradiction that houses still standing were built, prior to the application for the patent, of alternate layers of rock-face and smooth-face stone, presenting substantially the same appearance to the eye as a building of stone made after the design of the patent.

—Clark v. Harmon S. Palmer Hollow Concrete Bldg. Block Co., 149 Fed. 1001.....79 C. C. A. 511

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**§ 7. Patents enumerated.**

ENGLISH.

1845.

10,938. Improvement in preparation of silk, held to anticipate U. S. patent No. 705,715 ..... 60

UNITED STATES.

DESIGN.

33,633. Design for casing for disinfectant, held valid and infringed ..... 359
36,806. Design for building stone, held void for anticipation and lack of invention... 511

ORIGINAL.

64,038. Machine for making book covers, cited..... 446
105,329. Book-sewing machine, cited 169
181,979. Separable button catch, cited ..... 181
195,322. Governor for regulating the speed of machinery, cited ..... 507
210,847. Governor, cited..... 507
230,264. Magneto-electric generator for telephone call-signals, cited ..... 507
267,965. Governor, cited..... 507
288,051. Armature core, cited..... 233
295,060. Governor for water wheels, cited ..... 507
298,643. Hat rounding machine, cited ..... 446
308,790. Apparatus for handling seed cotton, cited..... 501
345,670. Speed regulator, cited..... 507
350,991. Book-sewing machine, cited .....170, 171
352,368. Gas engine speeder, cited.. 507
362,041. Apparatus for handling cotton, cited..... 501
367,241. Means for connecting engines and dynamos, cited 507
368,265. Electro mechanical brake, cited ..... 507
374,609. Glove fastener, cited..... 181
387,343. Dynamo, cited..... 234
388,307. Numbering machine, cited 179
397,340. Armature core, cited..... 235
403,376. Dynamo speeder for gas engines, cited.....507, 508
411,131. Furnace for reheating glassware, held not infringed, cited..... 513
435,613. Book-sewing machine, claims 3 and 15, held void for lack of patentable novelty, in view of prior art ..... 166
438,077. Clutch, cited..... 507
437,704. Regulator for electric generators and motors, cited 507
439,204. Electric motor, cited..507, 508
440,590. Electrical governor, cited.. 507
442,855. Furnace for reheating glassware, held not infringed ..... 513
449,959. Ball bearings, held not infringed .....177, 178
449,968. Ball bearings, held not infringed .....177, 178
452,976. Governor for phonographs, cited ..... 507
456,392. Speed governor, cited..... 507
462,348. Gearing for electro-magnetic motors, cited..... 507
463,171. Machine for folding textile or other material, cited ..... 446
472,607. Feeders for cotton gin, held not anticipated and valid. Also held infringed as to claims 1, 2, 9 and 12 .....499, 500, 501. 505
478,473. Seed-cotton receiver, cited 501
485,130. Folding machine, cited.... 446
488,446. Apparatus for feeding seed cotton to gins, cited.... 500
491,829. Electric motor regulator, cited .....507, 508
502,678. Machine for folding collar or cuff blanks, cited... 446
504,132. Means for transmitting power from car axles to dynamos, cited..... 507
508,637. Armature cores, held void for lack of invention, and insufficiency of description .....229, 230

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513,603. Eye guard, held void for anticipation ..... 509
520,535. Machine for turning cuff blanks, cited..... 446
532,554. Candy cutting machine, held valid and infringed 449
547,671. Cotton cleaning apparatus, cited ..... 505
570,148. Car truss, held void for lack of patentable novelty .....89, 90
570,621. Cell-case machine, cited.. 175
580,000. Separable button, claim 1 held not anticipated, valid and infringed..... 180
599,438. Knitted fabric, held not infringed ..... 163
622,408. Cell-case machine, held void for lack of novelty and invention as to claim 1, and not infringed as to claim 19..... 174
633,516. Centrifugal electric switch, cited ..... 507
642,869. Controller for spark generator, construed and held not infringed.....505, 506
644,582. Cotton elevator and gin feeder, held void for anticipation .....500, 505
645,871. Folding machine, not anticipated, held valid and infringed ..... 443
659,194. Speed regulator, cited..... 507
676,084. Numbering machine, held not infringed..... 178
680,165. Cotton elevator, cleaner, and fader, cited..... 505
688,690. Printing presses, held not infringed .....171, 172
705,715. Process for lustering silk, held void for anticipation by British patent No. 10,938 of 1845..... 60, 61, 62
705,716. Machine for lustering silk, held void for anticipation and for lack of patentable novelty...60, 61, 62
751,998. Speed regulator for generators, cited..... 507
757,891. Pulley driving mechanism, cited ..... 507

## PAYMENT.

By guarantor, see "Guaranty," § 3.
Of insurance premiums, see "Insurance," § 1.
Of price of land sold, see "Vendor and Purchaser," § 2.

**§ 1. Recovery of payments.**

A consignee of a shipment of fruit, which, after the same was delivered to it and with full knowledge of the facts, paid without objection the charges of the carrier, including a charge for icing in transit, in addition to the published tariff rate for carriage, cannot thereafter maintain an action to recover back the amount of such icing charge, on the ground that it was illegally exacted.
—Knudson-Ferguson Fruit Co. v. Chicago, St. P., M. & O. Ry. Co., 149 Fed. 973.....79 C. C. A. 483

## PENALTIES.

Under contracts, see "Damages," § 2.

## PERJURY.

False oath by bankrupt, see "Bankruptcy," § 9.

## PERSONAL INJURIES.

*Particular causes or means of injury.*

See "Negligence."
Operation of street railroads, see "Street Railroads," § 1.

*Particular classes of persons injured.*

See "Seamen."
Employé, see "Master and Servant," § 1.
Passenger, see "Carriers," § 3.
Passenger on vessel, see "Shipping," § 1.



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## PETITION.

*In judicial proceedings.*

See "Removal of Causes," § 2.
In bankruptcy, see "Bankruptcy," § 1.
To revise in bankruptcy proceedings, see "Bankruptcy," § 8.

## PIERS.

See "Wharves."

## PLEA.

In criminal prosecutions, see "Criminal Law," § 2.

## PLEADING.

*In particular actions or proceedings.*

See "Admiralty," § 1; "Bankruptcy," § 1; "Equity," § 1; "Injunction," § 3.
For infringement of patent, see "Patents," § 4.
For personal injuries, see "Master and Servant," § 2.
For price of land, see "Vendor and Purchaser," § 4.
For relief against fraud in sale of public land, see "Public Lands," § 1.
Indictment or criminal information or complaint, see "Indictment and Information."
Petition to revise in bankruptcy, see "Bankruptcy," § 8.
Pleas in criminal prosecutions, see "Criminal Law," § 2.
To foreclose mortgage, see "Mortgages," § 1.

*Review of decisions and pleading in appellate courts.*

Finality of rulings on for purpose of review, see "Appeal and Error," § 1.
Objections for purpose of review, see "Appeal and Error," § 2.

## PLEDGES.

Recovery of pledge from trustee in bankruptcy, see "Bankruptcy," § 2.

## POLICY.

Of insurance, see "Insurance."

## PRACTICE.

Adoption by United States courts of practice of state courts, see "Courts," § 1.
In patent office, see "Patents," § 3.
Procedure of particular courts, see "Courts."

*In particular civil actions or proceedings.*

Condemnation proceedings, see "Eminent Domain," § 1.

*Particular proceedings in actions.*

See "Evidence"; "Judgment"; "Jury"; "Removal of Causes"; "Trial."
Verdict, see "Trial," § 3.

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*Particular remedies in or incident to actions.*

See "Injunction."

*Procedure in criminal prosecutions.*

See "Criminal Law."

*Procedure in exercise of special or limited jurisdiction.*

In admiralty, see "Admiralty"; "Collision," § 3; "Salvage," § 3.
In bankruptcy, see "Bankruptcy," § 1.
In equity, see "Equity."

*Procedure on review.*

See "Appeal and Error"; "Exceptions, Bill of."

## PREJUDICE.

Ground for reversal in civil actions, see "Appeal and Error," § 7.

## PRELIMINARY INJUNCTION.

See "Injunction," § 4.

## PREMIUMS.

Insurance premiums, see "Insurance," § 1.

## PRESUMPTIONS.

In civil actions, see "Evidence," § 1.

## PRINCIPAL AND AGENT.

Agency of partner for firm, see "Partnership," § 1.
Insurance agents, see "Insurance," § 1.

**§ 1. Mutual rights, duties, and liabilities.**

Where, in an action for services under an alleged express contract to pay 10 per cent. of the price of certain sales of machinery made by plaintiff, defendant denied the contract as alleged, and averred that the agreement provided for a much smaller compensation, evidence as to the reasonable value of plaintiff's services was admissible as bearing on the question as to which agreement was made.

—Standard Plunger Elevator Co. v. Brumley, 149 Fed. 184..... 79 C. C. A. 132

Where, in an action for agents' commissions on sales of machinery, the oral contract sued on did not provide as to the time when the amounts claimed should be payable, evidence as to the time usually fixed for the payment of similar commissions was admissible.

—Standard Plunger Elevator Co. v. Brumley, 149 Fed. 184..... 79 C. C. A. 132

Where, in an action for agents' services in the sale of certain machinery, plaintiffs claimed for additional services rendered to defendants in the performance of certain contracts outside their general oral contract of agency, whether such extra services were incident to such contract or whether they were independent thereof was for the jury.

—Standard Plunger Elevator Co. v. Brumley, 149 Fed. 184..... 79 C. C. A. 132

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## PRINCIPAL AND SURETY.

See "Guaranty."

## PRIORITIES.

Between claims against bankrupt estate, see "Bankruptcy," § 6.

## PRIVILEGE.

Of witness as to testimony, see "Witnesses," § 1.

## PRIVILEGED COMMUNICATIONS.

Defamatory communications, see "Libel and Slander," § 1.

## PROCESS.

See "Injunction."

## PROMISSORY NOTES.

See "Bills and Notes."

## PROPERTY.

*Particular species of property.*

See "Mines and Minerals"; "Shipping"; "Trade-Marks and Trade-Names."

*Remedies involving or affecting property.*

Protection of rights of property by injunction, see "Injunction," § 2.

*Transfers and other matters affecting title.*

Taking for public use, see "Eminent Domain."

## PROXIMATE CAUSE.

Direct or remote consequences of injury, see "Damages," § 1.

## PUBLICATION.

Of libel, see "Libel and Slander," §§ 1, 2.

## PUBLIC LANDS.

Mineral lands, see "Mines and Minerals," § 1.

**§ 1. Survey and disposal of lands of United States.**

Under Act Cong. March 3, 1891, c. 561, 26 Stat. 1099 [U. S. Comp. St. 1901, p. 1467], providing for the disposition of town site lots in Alaska, and authorizing the trial of conflicting claims before the trustee on notice with an appeal to the Commissioner of the General Land Office, and from his

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decision to the Secretary of the Interior, the decision of the trustee is final, in the absence of fraud, accident, or mistake, with reference to all questions of fact arising in such proceeding, except as the same may be reversed by the Commissioner of the General Land Office or the Secretary of the Interior.
—Miller v. Margerie, 149 Fed. 694.....79 C. C. A. 382

In a suit to set aside a deed by an Alaska town site trustee for fraud, the fact that the proceeding in which defendant obtained the legal title to the lot in controversy was ex parte, was not of itself sufficient ground to justify a court of equity in entering on an inquiry as to the truth or falsity of the evidence on which the trustee acted in confirming defendant's claim to the property; but it was incumbent on complainants to allege facts showing that, without negligence on their part, they were prevented by fraud or accident from appearing before the trustee and submitting evidence to establish their right to enter the property.
—Miller v. Margerie, 149 Fed. 694.....79 C. C. A. 382

In a suit to set aside a deed of an Alaska town site trustee for fraud, it was not sufficient to allege generally that complainants did not have knowledge of the hearing before the trustee or an opportunity to prove that the representations made by defendant to the trustee in obtaining the legal title to the property were false, but the bill must also state the particular facts and circumstances which prevented complainants from having notice of the proceeding and an opportunity to protect their rights.
—Miller v. Margerie, 149 Fed. 694.....79 C. C. A. 382

## PUBLIC USE.

Taking property for public use, see "Eminent Domain."

## PUBLIC WATER SUPPLY.

See "Waters and Water Courses," § 1.

## QUESTIONS FOR JURY.

In civil actions, see "Trial," § 1.

## QUIETING TITLE.

To mining claim, see "Mines and Minerals," § 1.

§ 1. **Right of action and defenses.**
A deed executed by a stranger to the title, or which for other reasons is void on its face, to convey title creates no such cloud upon the title as confers jurisdiction on a court of equity of a suit for its cancellation.
—Ashburn v. Graves, 149 Fed. 968; Graves v. Crawford, Id.....
79 C. C. A. 478

In the absence of any local statute affecting the question, a suit in equity to remove a cloud upon the title to real estate cannot be maintained in a federal court by a complainant out of possession.
—Ashburn v. Graves, 149 Fed. 968; Graves v. Crawford, Id.....
79 C. C. A. 478

## RAILROADS.

See "Street Railroads."
As employers, see "Master and Servant."
Carriage of goods and passengers, see "Carriers."
Grant to railroad of right to use street, see "Municipal Corporations," § 1.

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§ 1. **Construction, maintenance, and equipment.**

Under the settled law of Illinois, authority given a railroad company by a city to cross a street with its tracks confers no exclusive rights in such street, but the right granted is subordinate to the use of the street for ordinary street purposes, which include the operating of a street railroad thereon; and the railroad company cannot maintain a suit in equity to enjoin the building and operating of a street railroad upon such street, crossing its tracks at grade, on the ground that such crossing will cause inconvenience to it in the operation of its trains, and add to the dangers of the street crossing.

—East St. Louis Ry. Co. v. Louisville & N. R. Co., 149 Fed. 159..... 79 C. C. A. 107

§ 2. **Operation.**

In an action against a railroad company for killing the superintendent of a milling company by crushing him between certain cars and a wooden spout or chute through which grain was loaded from the mill into the cars, evidence *held* to require submission to the jury of the question of defendant's negligence in backing the cars onto the switch without notice to decedent.

—Toledo, St. L. & W. R. Co. v. Connolly, 139 Fed. 398..... 79 C. C. A. 218

## RECEIVERS.

Injunction against receiver, see "Injunction," § 2.

## RECORDS.

Of judgment, see "Judgment," § 1.

## REHEARING.

On appeal or writ of error, see "Appeal and Error," § 6.

## RELEASE.

See "Payment."

§ 1. **Requisites and validity.**

The defendant, having a good position with the Standard Oil Company, at Bayonne, N. J., was induced by the plaintiff to undertake the management of a zinc mine for him in Missouri, in which the plaintiff was largely interested, being promised a salary of $7,500 and an interest in the mining company, for which he gave plaintiff the note in suit for $15,050, with the stock of the company as collateral. The plaintiff being also interested in a cattle company at Kansas City, and its affairs becoming involved, and a receiver being necessary, the defendant subsequently at his request accepted the position and performed its duties for a number of months, being put under great mental and physical strain in consequence, and also subjected to possible pecuniary liability on his bond, by which he might lose all his property. Wishing to give up the position, he was urged by the plaintiff as a personal favor to continue, which he did. Later on there was a crisis in the affairs of the cattle company, and a large sum of money was necessary to enable the plaintiff, who had guaranteed some $2,000,000 of its obligations, to maintain himself, which money the defendant secured by a personal appeal to the plaintiff's brother, who was a man of affluence in New York. Feeling, however, that his position was insecure, the defendant while on this trip obtained another, at a good salary, with a company in Pittsburg; but upon his return, at the earnest solicitation of the

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plaintiff and his counsel, was led to give it up and keep on with the cattle company, the plaintiff guarantying and paying the salary which had been promised him from the mining company, but which had been stopped, to which payment, however, the defendant contributed the compensation allowed him by the court as receiver, amounting to $3,800. A few months later the zinc mine was sold at a serious loss; the defendant's interest being made practically worthless. About this time, in a casual interview in a street car, the plaintiff, who had several times before expressed his willingness to give up the defendant's note, saying that he did not wish him to lose anything by the venture, declared to the defendant that he might consider the note discharged; the services which he had rendered to the plaintiff and the sacrifices that he had made to do so being referred to and assigned as the reason. The note, however, was not given up, the plaintiff explaining that it might prejudice him with others, whose notes for similar interests he held and whom he proposed to sue. *Held*, in a subsequent suit by the plaintiff on the note, that there was sufficient consideration for the promise to release, which was set up, and that a verdict for the defendant should be sustained.

—Rockefeller v. Wedge, 149 Fed. 130.....79 C. C. A. 26

## REMAND.

Of cause on appeal or writ of error, see "Appeal and Error," § 8.
Of cause removed from state court, see "Removal of Causes," § 3.

## REMITTITUR.

Of cause on appeal or writ of error, see "Appeal and Error," § 8.

## REMOVAL OF CAUSES.

**§ 1. Origin, nature, and subject of controversy.**

Where suit was brought in a state court against defendant as "the duly qualified and acting postmaster at Dallas, Tex.," and sought relief against certain official acts performed by the defendant under orders of the Postmaster General, it was a suit against an officer of the United States in his official capacity, and removable to the federal courts, under Act Cong. Aug. 13, 1888, c. 866, § 2, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], authorizing the removal of cases arising under the laws of the United States of which the Circuit Courts of the United States are given original jurisdiction by section 1.

—Bryant Bros. Co. v. Robinson, 149 Fed. 321.....79 C. C. A. 259

**§ 2. Proceedings to procure and effect of removal.**

The proper procedure for removing a cause from a state to a federal court as authorized by act Cong. Aug. 13, 1888, c. 866, §§ 1, 2, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], is for the defendant to file a petition for removal in the state court, together with a bond conditioned that the defendant will enter in the federal Circuit Court on the 1st day of its next session, a transcript of the record from the state court, and will pay costs awarded in case it shall be determined that the suit has been wrongfully removed.

—Bryant Bros. Co. v. Robinson, 149 Fed. 321.....79 C. C. A. 259

**§ 3. Remand or dismissal of cause.**

The removal by one of two joint defendants of a cause which was not removable because of the absence of a separable controversy does not give the federal court jurisdiction, and the cause should be remanded

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at any stage, at the instance of any party or on the court's own motion, whenever such fact appears.

—International & G. N. R. Co. v. Hoyle, 149 Fed. 180..79 C. C. A. 128

Act Cong. March 3, 1875, c. 137, § 5, 18 Stat. 472 [U. S. Comp. St. 1901, p. 511], provides that when a case is removed from a state court to a Circuit Court of the United States, it shall be remanded whenever it shall appear to the satisfaction of the Circuit Court at any time after removal that the suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of such Circuit Court. *Held* that, where a cause was properly removable, and was actually removed, it would not be remanded because of an irregularity in the proceedings for removal or because such proceedings were taken under the improper statute.

—Bryant Bros. Co. v. Robinson, 149 Fed. 321.....79 C. C. A. 259

**§ 4. Proceedings in cause after removal.**

Rev. St. § 643 [U. S. Comp. St. 1901, p. 521], provides that after removal of a cause from a state to the federal courts, it shall proceed as a cause originally commenced in the federal court. Section 914 [U. S. Comp. St. 1901, p. 684] declares that the practice, pleadings, forms and modes of civil procedure other than equity and admiralty causes in the federal and District Courts shall conform as near as may be to the practice in the state courts, and section 913 [U. S. Comp. St. 1901, p. 683] requires that the forms and modes of procedure in suits in equity shall be according to the rules and usages which belong to courts of equity and to rules of court made in conformity to law. *Held*, that where a suit in equity is removed from a state to a federal court, it must thereafter conform to the equity practice and rules in force in such court, regardless of the forms of practice in equitable proceedings in the state court.

—Bryant Bros. Co. v. Robinson, 149 Fed. 321.....79 C. C. A. 259

## REMOVAL OF CLOUD.

See "Quieting Title."

## REPORTS.

False report by bank officer, see "Banks and Banking," § 2.

## REQUESTS.

For instructions in civil actions, see "Trial," § 2.

## RESCISSION.

Of contract, see "Contracts," § 3.
Of contract for sale of goods, see "Sales," § 2.
Of contract for sale of land, see "Vendor and Purchaser," § 1.

## RES JUDICATA.

See "Judgment," § 3.

## REVENUE.

See "Customs Duties"; "Taxation."

## REVIEW.

See "Appeal and Error"; "Criminal Law," § 6.
Bill in equity, see "Equity," § 3.

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## REWARDS.

Where defendant, as sheriff of a county, offered a reward "for the arrest of each of the parties convicted" of a certain bank robbery and murder, the reward was not accepted merely by the giving of information concerning the whereabouts of the suspect, but could only be accepted by the party assuming the personal danger and responsibility of either actually arresting the suspect or causing some other person to arrest him.
—McClaughry v. King, 147 Fed. 463.....79 C. C. A. 91

## RISKS.

Assumed by employé, see "Master and Servant," § 1.
Within insurance policy, see "Insurance," § 2.

## ROADS.

Streets in cities, see "Municipal Corporations," § 1.

## ROYALTY.

For license to use patent, see "Patent," § 4.

## RULES OF COURT.

Assignment of errors, see "Appeal and Error," § 4.
Briefs on appeal, see "Appeal and Error," § 5.
Entry of judgment, see "Judgment," § 1.
Rehearing on appeal, see "Appeal and Error," § 6.

## RULES OF NAVIGATION.

See "Collision," § 1.

## SALES.

By or to bankrupt, see "Bankruptcy," § 2.
Compensatory damages for breach of contract of sale, see "Damages," § 1.
In bankruptcy proceedings, see "Bankruptcy," § 4.
Of public lands, see "Public Lands," § 1.
Of realty, see "Vendor and Purchaser."
Tax sales, see "Taxation," § 1.

**§ 1. Construction of contract.**
Plaintiff contracted to deliver 1,000 bales of cotton, of specified grades and at specified prices, on or before October 15, 1905, to a carrier, according to shipping directions to be furnished by defendants; plaintiff to pay cost and freight to Liverpool. About October 3d the point of delivery was changed; plaintiff agreeing to deliver at its warehouses in Birmingham and Decatur, Ala. On October 4th defendants sent an agent to Birmingham to receive cotton to be tendered there, and he, after accepting 100 bales, refused to examine or accept more, because the cotton tendered was not equal in staple to the contract quality. The agent was requested to go to Decatur and examine cotton to be tendered

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there, but refused, and on October 7th defendants, claiming a violation of the contract, gave notice of cancellation and thereafter refused to accept any further tenders. *Held*, that plaintiff had until October 15th in which to tender cotton complying with the contract, and that defendants' refusal to inspect and accept was premature, and entitled plaintiff to recover damage as for a breach of contract.

—McBath v. Jones Cotton Co., 149 Fed. 383.....79 C. C. A. 203

**§ 2. Modification or rescission of contract.**

In an entire contract for successive deliveries of goods sold, a vendor's breach in the earlier deliveries may relieve the vendee from liability for subsequent deliveries, if prompt notice of refusal to perform is given by the latter.

—McDonald v. Kansas City Bolt & Nut Co., 149 Fed. 360.....
79 C. C. A. 298

Immediate notice to the vendor, upon the discovery of his default in the earlier deliveries, that the vendee will not receive subsequent deliveries, or will not further perform, is an indispensable condition of the latter's release from liability for subsequent deliveries which comply with the contract.

—McDonald v. Kansas City Bolt & Nut Co., 149 Fed. 360.....
79 C. C. A. 298

Upon discovery of the vendor's breach, the vendee has the option to perform, or to refuse to perform, the remainder of the contract. But silence, delay, or failure to give notice of his choice to refuse is a choice to perform, and it destroys the option.

—McDonald v. Kansas City Bolt & Nut Co., 149 Fed. 360.....
79 C. C. A. 298

**§ 3. Performance of contract.**

The rules applicable to an anticipatory breach of a contract apply as well to one party as to the other. The general rule applicable to a contract for sale and future delivery of articles not specifically designated is that a buyer cannot reject a delivery conformable to the contract, when made in time, merely because there had been a prior tender of goods not conformable and rejected on that ground.

—McBath v. Jones Cotton Co., 149 Fed. 383.....79 C. C. A. 203

**§ 4. Remedies of buyer.**

The difference between the value of the goods furnished and the value of the goods the vendor agreed to furnish constitutes the measure of damages the vendee is entitled to recover for a failure to furnish articles of an agreed character, in the absence of knowledge of special circumstances which make other damages natural and probable, because these are the only damages that would naturally flow from the breach of such a contract in the usual course of events.

—McDonald v. Kansas City Bolt & Nut Co., 149 Fed. 360.....
79 C. C. A. 298

## SALVAGE.

**§ 1. Right to compensation.**

The Return, having broken her shaft, was floating helplessly on the Ohio river, when she made signals of distress to libelants' steamboat, in response to which the latter made fast its tow to a telegraph pole on the river bank and went to the Return's assistance. The Return was without means to get out a line, and was in grave peril of drifting against the wall of a dam, or another obstruction below, when libelants' vessel took her to a landing. *Held*, that the service rendered by libelants' vessel was voluntary, and constituted a salvage service.

—Neel v. Iron City Sand Co., 149 Fed. 980.....79 C. C. A. 490

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**§ 2. Amount and apportionment.**

A decree awarding libelants $25, and directing each party to pay their own costs, was inadequate; libelants being entitled to at least $100, with costs in the trial court.

—Neel v. Iron City Sand Co., 149 Fed. 980.....79 C. C. A. 490

**§ 3. Lien and recovery.**

Where a charge for landing a steamer in distress was really a claim for salvage, it was rightfully cognizable by a court of admiralty in a proceeding wherein the members of the salving vessel's crew could participate; and hence such claim was properly withdrawn from an action by the owner of the salving vessel in a state court against the owner of the vessel saved to recover on an account for services rendered, etc.

—Neel v. Iron City Sand Co., 149 Fed. 980.....79 C. C. A. 490

## SATISFACTION.

See "Payment"; "Release."

## SCAFFOLDS.

Liability of employer for defects, see "Master and Servant," § 1.

## SCHEDULE.

Of rates for carriage of goods, see "Carriers," § 1.

## SEAMEN.

Where a fireman on a tug was injured in the course of his employment, the fact that the tug was engaged in comparatively short coast-wise trips did not relieve her from the usual obligation of a vessel to her crew to furnish care and maintenance to effect a cure.

—The Mars, 149 Fed. 729.....79 C. C. A. 435

The obligation of a vessel to furnish medical attendance, etc., to a seaman injured in her service does not end with the termination of the voyage, where there was not sufficient time or facilities for the vessel to have then performed its duty.

—The Mars, 149 Fed. 729.....79 C. C. A. 435

A seaman injured in the course of his employment by his own negligence does not thereby forfeit his right to cure and maintenance at the expense of the vessel, where the injury was not caused by his gross negligence or willful neglect of orders, etc.

—The Mars, 149 Fed. 729.....79 C. C. A. 435

Where libelant, a fireman on a tug, was scalded while attempting to tighten the packing on the valve of an ash hoist, resulting from his turning a screw the wrong way and the machinery was not materially defective, the tug was not liable for his injuries.

—The Mars, 149 Fed. 729.....79 C. C. A. 435

## SEPARABLE CONTROVERSIES.

Removal from state court, see "Removal of Causes," § 3.

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## SET-OFF AND COUNTERCLAIM.

§ 1. **Nature and grounds of remedy.**
A defendant cannot plead an indebtedness of plaintiff as a set-off or counterclaim in an action at law for conversion in a federal court.
—Van Zandt v. Hanover Nat. Bank, 149 Fed. 127.....79 C. C. A. 23

## SETTLEMENT.

See "Payment"; "Release."

## SHIPPING.

See "Admiralty"; "Collision"; "Salvage"; "Seamen"; "Towage"; "Wharves."
Instructions as to contributory negligence of passenger on vessel, see "Negligence," § 1.

§ 1. **Carriage of passengers.**
Defendant operated a passenger boat between the city of Cincinnati and a pleasure resort a few miles up the river. Passengers in going to and from the vessel at Cincinnati passed over a wharfboat, between which and the steamer there was a railed bridge three feet wide, and on the side of the steamer, where it rested, there was a space in the railing nine feet wide. Guards were usually stationed at such space on either side of the bridge to protect passengers going off the boat from stepping or falling off. Plaintiff's intestate, a boy 12 years old, with his mother, her sister, and two small children, returned on the boat late one evening with some 1,000 other passengers. There was much crowding at the bridge, and each of the women carried a child. In passing onto the bridge in some way plaintiff's intestate went to one side, and fell between the boats and was drowned. There was evidence tending to show that there were no guards stationed at the sides of the bridge. *Held*, that the question of defendant's negligence was one for the jury.
—Coney Island Co. v. Dennan, 149 Fed. 687.....79 C. C. A. 375

## SIGNATURES.

To pleading, see "Equity," § 1.

## SLANDER.

See "Libel and Slander."

## SPECIFIC PERFORMANCE.

§ 1. **Proceedings and relief.**
In decreeing the specific performance of a contract, a court of equity may adapt it to conditions which were not foreseen by the parties when it was made, by requiring the complainant to assent to such modifications and limitations as justice requires in view of such new conditions.
—Wright v. Vocalion Organ Co., 148 Fed. 209.....79 C. C. A. 183

## STATES.

See "United States."
Conclusiveness of judgment in state court in other states, see "Judgment," § 4.
Courts, see "Courts."

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# STATUTES.

*Provisions relating to particular subjects.*

See "Bankruptcy," § 6; "Banks and Banking," § 2; "Carriers," § 2; "Customs Duties"; "Eminent Domain," § 1; "Grand Jury"; "Indians"; "Indictment and Information," § 1; "Mines and Minerals," § 1; "Municipal Corporations," § 1; "Removal of Causes," §§ 3, 4.

Alien contract labor, see "Aliens," § 1.

**§ 1. Construction and operation.**

The title of a legislative act cannot be so read into the body of it as to supply the absence of a substantive provision essential to the conferring of power and authority.

—Rider v. United States, 149 Fed. 164.....79 C. C. A. 112

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## STREET RAILROADS.

See "Railroads."
Carriage of passengers, see "Carriers."
Grant to street railroad of right to use street, see "Municipal Corporations," § 1.

**§ 1. Regulation and operation.**

A plaintiff who, after seeing a street car approaching while he was still upon the sidewalk, started to cross a curved track which led into a cross street without again looking, and was struck by the car and injured, was chargeable with contributory negligence as matter of law, and cannot recover for the injury; nor is he relieved from such negligence by the fact that there was another track, which went straight ahead past the corner.

—Pittsburgh Ry. Co. v. Cluff, 149 Fed. 732.....79 C. C. A. 438

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## STREETS.

See "Municipal Corporations," § 1.

## TARIFF.

See "Customs Duties."

## TAXATION.

See "Customs Duties."

§ 1. **Sale of land for nonpayment of tax.**
Where each of two tracts of land was assessed for taxation at its true value as the property of the owner of the fee, and she paid the full amount of the taxes due thereon, notwithstanding an outstanding one-sixteenth interest in any oil that might be produced from the land, a sale of such interest for nonpayment of taxes assessed thereon was void.
—Bee v. Barnes, 149 Fed. 727.....79 C. C. A. 433

## TENDER.

Of price for land, see "Vendor and Purchaser," § 2.

## THEFT.

See "Larceny."

## TIME.

*For particular acts in or incidental to judicial proceedings.*

Amendment of order of discharge in bankruptcy, see "Bankruptcy," § 7.
Commencement of action on insurance policy, see "Insurance," § 3.
Filing petition for rehearing, see "Appeal and Error," § 6.

*For particular acts not judicial.*

Delivery of goods sold, see "Sales," § 1.

## TITLE.

Removal of cloud, see "Quieting Title."
To patent, see "Patents," § 4.

## TOOLS.

Liability of employer for defects, see "Master and Servant," § 1.

## TORTS.

*Particular torts.*

See "Conspiracy"; "Fraud"; "Libel and Slander"; "Negligence."
Causing death, see "Death," § 1.
Maritime torts, see "Collision."

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## TOWAGE.

Collisions with tugs and vessels in tow, see "Collision," § 2.
Pleading in admiralty in action for loss of tow, see "Admiralty," § 1.

A steamship *held* not in fault for the sinking of a barge which she was towing on one of her regular trips from New York to Cuba, because of her keeping up her regular speed until the barge was found to be in distress, where the weather was fair, and the sinking resulted from the unseaworthiness of the barge for such a voyage due to her age and structural weakness, which condition was not known to the master of the steamship nor apparent; he having the right to rely on the assumption that her owner considered her fit for the voyage when he contracted for the towage, knowing that the steamship was required to make schedule time.

—Dady v. Bacon, 149 Fed. 401.....79 C. C. A. 221

A finding affirmed that a tug was in fault for the loss of her tow by running her upon a sunken wreck at night, upon evidence showing without contradiction that a lantern showing a red light, and capable of burning for 24 hours after each filling, was filled, lighted, and set above the wreck on the evening before, and that it was burning brightly two hours before the collision, and that the tug maintained no sufficient lookout.

—The Volunteer, 149 Fed. 723.....79 C. C. A. 429

A tug is not liable merely because a tow was injured while in its custody, but in an action against it to recover for the injury, the burden rests upon the libelant to affirmatively prove negligence or fault, which cannot be presumed merely because the injury is not otherwise accounted for.

—The Winnie, 149 Fed. 725.....79 C. C. A. 431

## TOWNS.

See "Municipal Corporations."
Town sites in Alaska, see "Public Lands," § 1.

## TRADE-MARKS AND TRADE-NAMES.

**§ 1. Infringement and unfair competition.**

Complainants adopted the name "Angostura" as the name of bitters originally manufactured by them in the town of that name in Venezuela, and continuously used the same thereafter, though the name of the town was subsequently changed. Complainants' bitters became widely and favorably known under such name. *Held*, that complainants were entitled to protection in the use of the name as against persons using it to create dishonest competition, though complainants could not obtain a monopoly in the use of the word as a trade-mark.

—Siegert v. Gandolfi, 149 Fed. 100.....79 C. C. A. 142

Where defendants imitated both the name and bottles in which complainants' "Angostura" bitters were sold, the labels being similar, except that they disclosed the fact that defendants' bitters were made in Baltimore, Md., instead of Port of Spain, in Trinidad, where complainants' bitters were made, defendants were guilty of unfair competition.

—Siegert v. Gandolfi, 149 Fed. 100.....79 C. C. A. 142

Complainants manufactured and sold "Angostura" bitters under representations that it consisted of a mixture of certain bitter, aromatic, and carminative substances, together with alcohol added as a preservative

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solvent, and that the bitters did not contain any "intoxicating ingredients." An advertising circular contained certificates of physicians and customers, representing that the bitters were a valuable remedy for nearly all ills, and when mixed with water, beer, wine, and spirits, made a "splendid drink," and also that the bitters were free from dangerous ingredients and might be used by invalids, adults, and children to advantage. *Held*, that the statement that the bitters contained no intoxicating ingredients should be construed as referring to the herbs and simples of which it was composed, and that such representations were not so false and fraudulent as to deprive complainants of relief in a suit to enjoin unlawful competition.

—Siegert v. Gandolfi, 149 Fed. 100.....79 C. C. A. 142

## TRIAL.

See "Witnesses."

Exceptions for purpose of review of instructions, see "Appeal and Error," § 2.
Harmless error in submission of issues to jury, see "Appeal and Error," § 7.

*Proceedings incident to trials.*

Summoning and impaneling jury, see "Jury," § 1.

*Trial of particular civil actions or proceedings.*

See "Libel and Slander," § 2; "Negligence," § 1.

For compensation of agent, see "Principal and Agent," § 1.
For death caused by operation of railroad, see "Railroads," § 2.
For death of servant, see "Master and Servant," § 2.
For personal injuries, see "Shipping," § 1; "Master and Servant," § 2.

*Trial of criminal prosecutions.*

See "Criminal Law," §§ 3, 4; "Larceny," § 1.

**§ 1. Taking case or question from jury.**

On a motion to direct a verdict, the court must take that view of the evidence most favorable to the party against whom the direction is requested, who is entitled to the benefit of all fair and reasonable inferences from the testimony.

—Williams v. Choctaw, O. & G. R. Co., 149 Fed. 104..79 C. C. A. 146

A question of law arises at the close of the evidence whether there is any substantial evidence on which a verdict can be sustained in favor of the party producing the evidence, and, if there is no such evidence, it is the duty of the court to direct the jury to return a verdict against them.

—First Nat. Gold Min. Co. of New York & Colorado v. Altvater, 149 Fed. 393.....79 C. C. A. 213

A question of law always arises at the close of the evidence in any case in the federal courts, whether there is any substantial proof warranting a verdict in favor of plaintiff; and, in determining such question, all the evidence and reasonable inferences therefrom must be considered in the light most favorable to plaintiff.

—Crookston Lumber Co. v. Boutin, 149 Fed. 680.....79 C. C. A. 368

In order to justify the direction of a verdict, in an action tried in the federal courts, the undisputed evidence must be so conclusive that all reasonable men, in the exercise of an honest and impartial judgment, can draw but one conclusion therefrom, and that the court, in the exercise of a sound judgment, would be required to set aside a verdict returned in opposition thereto.

—Crookston Lumber Co. v. Boutin, 149 Fed. 680.....79 C. C. A. 368



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**§ 2. Instructions to jury.**

An instruction that a witness might be contradicted, not simply by a witness swearing to the opposite, but by the improbability of his story, and by anything, either in the testimony as given or in the circumstances of the case presented, which in the judgment of the jury tended to discredit the witness' statements, the jury being required to ascertain the truth by the exercise of common sense, etc., was proper.

—Toledo, St. L. & W. R. Co. v. Connolly, 149 Fed. 398..... 79 C. C. A. 218

It is not the duty of a court to reform a requested instruction and to cast out such parts as render it improper as a whole.

—Exchange Bank v. Moss, 149 Fed. 340; Same v. Davis, Id..... 79 C. C. A. 278

In an action to recover for the death of a boy 12 years old through the alleged negligence of defendant, a requested instruction, stating generally that plaintiff could not recover if the deceased failed to exercise reasonable care, was properly refused, where it did not explain or define what would constitute reasonable care in one of his age.

—Coney Island Co. v. Dennan, 149 Fed. 687.....79 C. C. A. 375

**§ 3. Verdict.**

Where several issues are submitted to a jury and a general verdict returned, the court may interrogate the jurors to specialize the verdict and state on which issue or issues it is based.

—Rockefeller v. Wedge, 149 Fed. 130.....79 C. C. A. 26

A verdict that "we the jury in the above case sustain the validity of the contract sued upon, and fix the damages at ten dollars," was fatally defective and insufficient to sustain a judgment.

—Pressed Steel Car Co. v. Steel Car Forge Co., 149 Fed. 182..... 79 C. C. A. 130

A verdict that "We, the jury in the above case, sustain the validity of the contract sued upon and fix the damages at $10," was incapable of amendment after the separation of the jury.

—Pressed Steel Car Co. v. Steel Car Forge Co., 149 Fed. 182..... 79 C. C. A. 130

## TROVER AND CONVERSION.

Set-off in action for conversion, see "Set-Off and Counterclaim," § 1.

## TRUSTS.

Trust deeds, see "Mortgages."

## TUGS.

See "Towage."

## ULTRA VIRES.

Acts of corporation, see "Corporations," § 1.

## UNFAIR COMPETITION.

See "Trade-Marks and Trade-Names," § 1.

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## UNITED STATES.

See "Customs Duties."
Courts, see "Courts," § 1; "Removal of Causes."
Estoppel of, by act of officers, see "Estoppel," § 1.
Indians, see "Indians."
Public lands, see "Public Lands," § 1.

**§ 1. Government and officers.**

Where a marshal has in good faith rendered accounts against the United States, covering services of his deputies, which have been audited and allowed by the proper accounting officers, and paid in accordance with the rules which have always previously been recognized as governing such allowances, and with knowledge that the greater part of the money would be paid over to the deputies rendering the services, the government is not entitled to recover the sums so paid from the marshal after years have elapsed, and he has gone out of office, and is without remedy to recoup his loss, and during which time no objection has been made to such payments by the executive departments or by Congress, which contined to appropriate money therefor, even though the allowances may have been made under an erroneous construction of the law.
—United States v. Walker, 148 Fed. 1022.....79 C. C. A. 392

**§ 2. Actions.**

When the sovereign comes into court to assert a pecuniary demand against the citizen or subject, the court has authority and is under duty to withhold relief to the sovereign, except upon terms which do justice to the citizen or subject, as determined by the jurisprudence of the forum in like subject-matter between man and man.
—United States v. Walker, 148 Fed. 1022.....79 C. C. A. 392

The limitation contained in Act March 3, 1887, c. 359, § 1, 24 Stat. 505 [U. S. Comp. St. 1901, p. 752], authorizing suits against the United States that "no suit against the government of the United States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made," in the case of a suit by a marshal to recover fees or disbursements, begins to run as to each item from the time the service was rendered or the disbursement made, and not from the expiration of the plaintiff's term of office.
—United States v. Walker, 148 Fed. 1022.....79 C. C. A. 392

## UNITED STATES COMMISSIONERS.

Criminal jurisdiction of, see "Criminal Law," § 1.

## UNITED STATES MARSHALS.

Recovery back by United States of compensation paid marshals, see "United States," § 1.

## VACATION.

Of sale of property of bankrupt estate, see "Bankruptcy," § 4.

## VENDOR AND PURCHASER.

See "Sales."
Mortgage securing purchase price of realty, see "Mortgages," § 1.
Specific performance of contract, see "Specific Performance."

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**§ 1. Modification or rescission of contract.**

Defendants purchased a group of mines that were being worked and at once took possession. Within four months thereafter they claimed to have learned that material misrepresentations had been made by the vendors as to the value and richness of the mines but continued to operate the same both for development and production for two years and until long after suit had been commenced by the vendors to foreclose a mortgage given to secure a note for purchase money, in which they answered setting up the fraud and also filed a cross-bill for rescission, no notice of the intention to rescind having been given to the vendors until the filing of such answer some five months after the fraud was discovered. *Held*, that by such laches they waived and irrevocably lost the right to rescind.

—Richardson v. Lowe, 149 Fed. 625.....79 C. C. A. 317

**§ 2. Performance of contract.**

A note given for the purchase price of land conveyed with covenants of warranty and against incumbrances, where there are existing incumbrances, is due at maturity only on condition that such incumbrances are removed, and a tender of payment subject to such condition is good and stops the running of interest.

—Neely v. Williams, 149 Fed. 60.....79 C. C. A. 82

**§ 3. Rights and liabilities of parties.**

The rule that, where land subject to an incumbrance is sold in parcels successively to different purchasers, the parcels are chargeable in the inverse order of alienation, is applicable in a case where the owner of separate tracts of land devised them together, charged with the payment of annuities, and the devisee sold and conveyed them successively by warranty deeds to different purchasers, and the last grantee who has expended money to obtain a release of the annuities cannot enforce contribution from the prior purchasers, but is entitled under his covenant of warranty to deduct the entire amount so necessarily expended from a deferred payment of purchase money due the grantor.

—Neely v. Williams, 149 Fed. 60.....79 C. C. A. 82

**§ 4. Remedies of vendor.**

Where a purchaser of property in defense to a note given for purchase money sets up fraud in the sale, the burden rests upon him to prove that the property was worth less than the price agreed to be paid, and how much less, and where the property consisted of mines the value of which cannot be accurately determined, and is largely speculative a finding by the trial court on conflicting evidence, that such burden has not been sustained by the proof of any damages will not be disturbed on appeal.

—Richardson v. Lowe, 149 Fed. 625.....79 C. C. A. 317

Although fraud inducing a purchase of property has been waived by laches as a ground for rescission of the contract, yet the purchaser may plead the resulting damages as a failure of consideration in defense of a note given for purchase money, provided he has fully performed on his part.

—Richardson v. Lowe, 149 Fed. 625.....79 C. C. A. 317

## VERDICT.

Directing verdict in civil actions, see "Trial," § 1.
In civil actions, see "Trial," § 3.
In criminal prosecutions, see "Criminal Law," § 4.

## VERIFICATION.

Of pleading, see "Equity," § 1.

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## VICE PRINCIPALS.

See "Master and Servant," § 1.

## VILLAGES.

See "Municipal Corporations."

## WAGERS.

See "Gaming," § 1.

## WAIVER.

See "Estoppel."
Of action for fraud, see "Fraud," § 1.
Of stipulations in insurance policy, see "Insurance," § 8.

## WATERS AND WATER COURSES.

Injunctions to restrain interference with water rights, see "Injunction," § 1.

**§ 1. Public water supply.**

A complainant corporation, which has made an appropriation of water from a stream in accordance with the laws of a state to be used in the generation of power for manufacturing and electrical purposes, and which has constructed a dam at large expense sufficient in height to enable it to use beneficially the quantity of water appropriated, is entitled to protection by injunction against a later appropriator, who for the purpose of obtaining the benefit of the dam is undertaking to take out ditches or canals a short distance above it, to be carried below around the ends of the dam, also for the purpose of generating power, where the effect would be, not only by lowering the water to lessen the power and efficiency of complainant's plant, but also to endanger its dam by the proximity of the proposed ditches.

—Trade Dollar Consol. Min. Co. v. Fraser, 148 Fed. 585..... 79 C. C. A. 37

## WAYS.

Public ways, see "Municipal Corporations," § 1.

## WHARVES.

Findings of the trial court affirmed that the sinking of libelant's car float at the float bridge of respondent railroad company, while it was unloading cars therefrom, was due to her unseaworthy condition caused by her having two feet of water in her hold, and that respondent was not negligent either in the manner of discharging her, or in failing to inspect her and measure the water in her hold, it appearing that it was her master's duty to notify it of her condition, and that no such notice was given, and her condition was not apparent without inspection.

—Bush Co. v. Central R. Co. of New Jersey, 149 Fed. 734; Central R. Co. of New Jersey v. Bush Co., Id.....79 C. C. A. 440

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# WILLS.

Abatement of purchase price of land by purchaser from devisees, see "Vendor and Purchaser," § 3.

# WITNESSES.

See "Evidence."
Examination of bankrupt, see "Bankruptcy," § 9.
Harmless error in rulings relating to, see "Criminal Law," § 6.

§ 1. **Examination.**

Bankr. Act July 1, 1898, c. 541, § 7, subd. 9, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3425], provides for the examination of a bankrupt at the instance of his creditors, and declares that no testimony given by him shall be offered in evidence against him in any criminal proceeding. *Held*, that the examination contemplated by such section relates to past transactions; that the words "in any criminal proceeding" are limited to proceedings arising out of the conduct of the bankrupt's business, the disposition of his property, etc.; that the immunity provided for is limited to protecting the bankrupt from the use of his evidence in such criminal proceedings as arise out of the conduct of his business or the disposition of his property, etc., and does not protect him from prosecution for false swearing in giving his evidence.

—Edelstein v. United States, 149 Fed. 636.....79 C. C. A. 328

§ 2. **Credibility, impeachment, contradiction, and corroboration.**

A witness was asked if stolen property had not been found in his possession and if witness had not been forced to pay for the property. *Held*, that the question was inadmissible, even to affect the credibility of the witness.

—Miller v. Territory of Oklahoma, 149 Fed. 330.....79 C. C. A. 268

In a prosecution for cattle theft, the credibility of a witness could not be impeached by proof that he had a "sweetheart" who was the niece of a fugitive from justice for murder, or that witness at times had consorted with persons reputed to have been charged with horse theft, etc.

—Miller v. Territory of Oklahoma, 149 Fed. 330.....79 C. C. A. 268

It was competent for the defense in a criminal prosecution, for the purpose of impairing the testimony of a witness for the territory, to show his interest by asking him if he had not contributed money to aid in the prosecution, and what his purpose was in so doing.

—Miller v. Territory of Oklahoma, 149 Fed. 330.....79 C. C. A. 268

Where an attorney was offered as a witness for the territory in a criminal case, it was competent for the defendant to show that the witness had received a retainer in the case to assist in the prosecution, and also to show in what capacity he was retained.

—Miller v. Territory of Oklahoma, 149 Fed. 330.....79 C. C. A. 268

# WRITS.

See "Injunction."
Writ of error, see "Appeal and Error."

[END OF VOLUME.]

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